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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JUDY WOODWARD, individually, and as the Bernalillo County Clerk and the BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BERNALILLO,
Petitioners,

v.

ELIZABETH PERRY,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 2000

QUESTIONS PRESENTED FOR REVIEW

1. Whether an at-will public employee has a contractual relationship with her public entity employer for purposes of 42 U.S.C. § 1981, in view of the fact that the State of New Mexico Legislature and the State of New Mexico Supreme Court refuse to allow a contractual relationship to exist between a public entity employer and its public employees absent a valid, written contract.

2. Whether the race or national origin of an individual chosen to replace a plaintiff alleging race discrimination in employment is a material factor in the fourth element of a *prima facie* showing of racial discrimination under the ***McDonnell Douglas*** analysis.

PARTIES TO PROCEEDING

The parties to this proceeding are:

1. Petitioner herein, and Appellee and Defendant below, Judy Woodward, individually and in her capacity as the Bernalillo County Clerk.

2. Petitioner herein, and Appellee and Defendant below, the Board of County Commissioners of the County of Bernalillo in the State of New Mexico.

3. Respondent herein, and Appellant and Plaintiff below, Elizabeth Perry.

There were no other parties to the proceeding in the Court whose judgment is sought to be reviewed, or in the proceedings below.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners, Judy Woodward, individually and in her capacity as the County Clerk, for the County of Bernalillo in the State of New Mexico, and the Board of County Commissioners for the County of Bernalillo, in the State of New Mexico, respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in this case on December 20, 1999.

OPINIONS AND ORDERS OF COURTS AND ADMINISTRATIVE AGENCIES BELOW

The December 20, 1999 order and opinion of the United States Court of Appeals for the Tenth Circuit, granting a timely petition for rehearing filed by Petitioners, and the judgment of which is sought in this petition to be reviewed, is reported at ***Perry v. Woodward, et al.***,199 F.3d 1126 (10th Cir. 1999), and is reprinted in Appendix A to this petition. The August 27, 1999 opinion of the United States Court of Appeals for the Tenth Circuit, which was withdrawn and superceded by the Tenth Circuit's later order and opinion of December 20, 1999, is published at ***Perry v. Woodward, et al.***,188 F.3d 1220 (10th Cir. 1999), and is reprinted in Appendix B. The prior opinion of the United States District Court for the District of New Mexico, an unpublished decision, No. CIV 96-1488 JHG/WWD, entered on October 7, 1997, is

reprinted in Appendix C. The Summary Judgment and Order of Dismissal entered on October 7, 1997 by the United States District Court for the District of New Mexico, No. CIV 96-1488 JHG/WWD, is reprinted in Appendix D. The prior Decision and Order of the Human Rights Commission of the State of New Mexico, an unpublished decision, HRD #94-06-09-0278, entered on August 30, 1996, is reprinted in Appendix E.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit that followed the United States Court of Appeals for the Tenth Circuit's Order granting a timely Petition for Rehearing filed by Petitioners was entered on December 20, 1999. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

APPLICABLE STATUTES

The following statutes are at issue:

I. **42 U.S.C. § 1981: Equal rights under the law.**

(a) Statement of equal rights.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and

enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "Make and enforce contracts" defined.

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment.

The rights protected by this section are protected against impairment by non-governmental discrimination and impairment under color of State law.

II. **N.M. Stat. Ann. § 37-1-23 (Michie 1990): Contractual liability; statute of limitations.**

A. Governmental entities are granted immunity from actions based on contract, except actions based on a valid written contract.

III. N.M. Stat. Ann. § 28-1-7 (Michie 1996): New Mexico Human Rights Act: Unlawful Discriminatory Practice.

It is an unlawful discriminatory practice for:

A. an employer, unless based on a bona fide occupational qualification, to refuse to hire, to discharge, to promote or demote or to discriminate in matters of compensation, terms, conditions or privileges of employment against any person otherwise qualified because of race, age, religion, color, national origin, ancestry, sex, physical or mental handicap or serious medical condition; provided, however, that 29 U.S.C. Section 631(c)(1) and (2) shall apply to discrimination based on age;

I. any person or employer to:

(1) aid, abet, incite, compel or coerce the doing of any unlawful discriminatory practice or to attempt to do so.

STATEMENT OF THE CASE

A. Background

Petitioner Judy Woodward, is the elected Bernalillo County Clerk and took office on January 1, 1993. APP. 5, APP. 73. Pursuant to the Bernalillo County Personnel Rules and Regulations then in effect, Woodward was authorized to select two people to serve as her deputy clerks, with both positions being at-will. APP. 73. In February, 1993, Woodward recruited Respondent Elizabeth Perry to work as one of Woodward's deputy clerks in the Bernalillo County Clerk's Office. APP. 5, APP. 73. Perry accepted the position offered by Woodward with the understanding that the deputy position was an at-will position. APP. 5. Additionally, there is no dispute that Perry did not have a written employment contract with Petitioners. APP. 9. Perry began her employment on March 1, 1993. APP. 5.

Woodward testified that she became dissatisfied with Perry's job performance after Perry took the deputy clerk position, and on February 26, 1994, Perry was terminated by Woodward. APP. 7, APP. 73, APP. 74. Although Woodward did not give a reason to Perry for the termination because Perry was at-will, Woodward later testified that Perry was terminated as a result of her failure to follow Woodward's directives, using the County of Bernalillo's business telephone for personal calls, failing to undertake additional training, and performance below the standards held by Woodward. APP. 74.

Shortly before terminating Perry, Woodward approached Irene Serna and Woodward informed Serna

that Woodward was contemplating terminating Perry's employment. APP. 7. Significantly, after Woodward terminated Perry's employment, Woodward hired Serna as Woodward's replacement for the deputy clerk position. APP. 7. Serna is Hispanic. APP. 7, APP. 73.

B. Proceedings Before the New Mexico Human Rights Commission and the United States District Court

Following her termination, Perry filed a complaint with the New Mexico Department of Labor, Human Rights Division alleging that she was discriminated against because of her National Origin, Hispanic. APP. 65. After holding a full administrative hearing, the Human Rights Commission found that Perry failed to adduce any direct evidence of discrimination and failed to make a *prima facie* showing of discrimination. APP. 65, APP. 72 - APP. 76. In reaching its decision, the New Mexico Human Rights Commission relied on the New Mexico Supreme Court decision announced in ***Smith v. FDC Corp.***, 109 N.M. 514, 787 P.2d 43 (1990), and held that in order to make a *prima facie* showing of discrimination, Perry bore the burden of proving: (a) that she was a member of a protected class; (b) that she was qualified for the position; (c) that she was terminated from the position; and (d) that she was replaced by someone from outside of the protected class. APP. 75. The Commission specifically concluded that because Perry's replacement, Irene Serna, was Hispanic, Perry failed to make the requisite showing that she was replaced by someone from outside of the protected class in order to demonstrate a *prima facie* case of discrimination. APP. 75.

Perry subsequently filed a Complaint and Notice of Appeal in the Second Judicial District Court of the State of New Mexico reiterating her allegations that Petitioners violated the New Mexico Human Rights Act and adding a claim against Petitioners under 42 U.S.C. § 1981 alleging that Petitioners had discriminated against Perry on the basis of her national origin, Hispanic, in the making and enforcement of a supposed employment contract between Perry and Petitioners. APP. 4, APP. 65. Petitioners removed the action to the United States District Court for the District of New Mexico, and on August 14, 1997, Petitioners filed their Motion for Summary Judgment. APP. 64 - APP. 65.

By stipulation of the parties, Petitioners' Motion for Summary Judgment was heard by United States Magistrate Judge Joe H. Galvan. APP. 4, n.1. On October 7, 1997, Judge Galvan entered his Memorandum Opinion in which he found that the Petitioners' Motion for Summary Judgment should be granted. APP. 64 - APP. 69. Specifically, Judge Galvan held that Perry had failed to present direct proof of a discriminatory motive or indirect proof of a discriminatory motive to support her claim of discrimination under the framework first announced by this Court in ***McDonnell-Douglas Corp. v. Green***, 411 U.S. 792 (1973). APP. 66 - APP. 68. Judge Galvan also found that Perry did not have a valid, written contract with her public employer, as required by New Mexico law. APP. 68. Consequently, Judge Galvan held that Petitioners were entitled to summary judgment on Perry's claims. APP. 68. Judge Galvan entered his Order granting Petitioners Summary Judgment and dismissing Perry's claims with prejudice. APP. 70 - APP. 71.

C. The Tenth Circuit's Decision

Perry filed a Notice of Appeal, appealing the grant of summary judgment in favor of Petitioners to the United States Court of Appeals for the Tenth Circuit. APP. 5. On December 20, 1999, the United States Court of Appeals for the Tenth Circuit entered its order granting a rehearing, denying the suggestion for rehearing *en banc*, withdrawing its prior panel opinion and issuing an amended opinion. APP. 1 - APP. 2.

In its opinion, the Tenth Circuit reversed the summary judgment in favor of Petitioners. APP. 5. The Tenth Circuit concluded that Perry's at-will employment, which consisted solely of Perry's rendition of services in exchange for the payment of wages, constituted a contractual relationship under New Mexico law. APP. 11. Moreover, the Tenth Circuit determined that Perry had sufficient contractual rights to support her discrimination claim under 42 U.S.C. § 1981. APP. 12 - APP. 13. The Tenth Circuit reached this result without any discussion of the fact that Perry's employer was not a private sector employer but instead a public entity. The fact that Perry's employer is a public entity is significant because both the New Mexico Legislature and the New Mexico Supreme Court have held that no contractual relationship can exist between a governmental entity and its employees absent a valid, written contract. ***See*** N.M. Stat. Ann. § 37-1-23 (Michie 1990); ***Trujillo v. Gonzales***, 106 N.M. 620, 747 P.2d 915 (1987).

Further, although the Tenth Circuit agreed with the district court that Perry failed to adduce any direct evidence of a racially-motivated discharge (APP. 15- APP.

16), the Tenth Circuit went on to hold that the district court erred as a matter of law when it held that Perry failed to make out her *prima facie* case of racial discrimination under both 42 U.S.C. § 1981 and the New Mexico Human Rights Act. APP. 29 - APP. 30, APP. 33 - APP. 34. In reaching this result, the Tenth Circuit focused on the fourth element of the ***McDonnell-Douglas*** *prima facie* case. Specifically, the Tenth Circuit held that the fourth element of the ***McDonnell-Douglas*** *prima facie* case can be satisfied merely by a showing that the claimant's employment position was filled after the claimant was terminated. APP. 29 - APP. 30. Effectively, therefore, at the *prima facie* stage of a plaintiff's discrimination claim, the Tenth Circuit now refuses to give any weight to the fact that a discrimination plaintiff is replaced by someone sharing the plaintiff's immutable, protected attribute.

REASONS FOR GRANTING THE PETITION

I. The Tenth Circuit "At-Will" Employment Contract Opinion Conflicts With and Effectively Preempts the State of New Mexico Legislature's and the New Mexico Supreme Court's Requirement that Contracts With a Public Entity Employer Be Valid, Written Contracts.

Perry's claims under 42 U.S.C. § 1981 are premised on Perry's allegations that the Petitioners discriminated against Perry in the enforcement of an existing employment contract by and between Perry and Petitioners. The Tenth Circuit confirmed that any claim

under Section 1981 must be supported by an underlying right of the employee to make and enforce a contract. APP. 10. The Tenth Circuit then decided that Perry's at-will employment with the County of Bernalillo constituted a contract between Perry and the County of Bernalillo with sufficient contractual rights to support Perry's Section 1981 claim. APP. 11 - APP. 13.

In reaching its decision, the Tenth Circuit relied on the New Mexico Supreme Court decision of ***Melnick v. State Farm Mutual Automobile Insurance Co.***, 106 N.M. 726, 730, 749 P.2d 1105, 1109 (1988), ***cert. denied***, 488 U.S. 822 (1988), for the proposition that an employee's rendition of services to the employer in exchange for the payment of wages by the employer to the employee constituted a contract. APP. 11. However, unlike this case, ***Melnick*** did not involve the employment of an individual by a public entity. ***See Melnick***, 106 N.M. at 730, 749 P.2d at 1105. This distinction is critical because the New Mexico Legislature has refused to allow a contractual relationship to exist between a public entity and an individual, including a public employee, without a valid written contract. ***See*** N.M. Stat. Ann. § 37-1-23 (Michie 1990).

N.M. Stat. Ann. § 37-1-23 (Michie 1990), provides that "governmental entities are granted immunity from actions based on contract, except actions based on a valid written contract." In interpreting this statute in the employment setting, the New Mexico Supreme Court has rejected the argument that the mere existence of an at-will employment relationship between an individual employee and a public entity employer constitutes a legally

enforceable contract between the employee and the public entity employer.

Specifically, in ***Trujillo v. Gonzales***, 106 N.M. 620, 747 P.2d 915 (1987), the plaintiff Manuel Trujillo was recruited by a Taos County Commissioner to take the job of Taos County Road Superintendent. ***Id.*** at 915. At the time, Trujillo was within two years of retirement from his job with the State of New Mexico and thus conditioned his acceptance of employment with Taos County on a guarantee of a two year employment term. ***Id.*** at 915-16. Following his termination, which took place just four months before the two (2) year anniversary of his employment with Taos County, Trujillo sued claiming that he had enforceable contract rights, specifically that he could not be terminated within the first two years of employment. ***Id.*** at 916.

Trujillo's claims were dismissed by the trial court due to the fact that Taos County's oral promise to Trujillo of a two year employment term was not a valid written contract as required by N.M. Stat. Ann. § 37-1-23. ***Id.*** The New Mexico Supreme Court upheld the dismissal finding, among other things, that an oral promise made by two commissioners outside of a duly constituted meeting of the Board did not bind Taos County. ***Id.*** at 917. The New Mexico Supreme Court also rejected Trujillo's argument that Taos County should be estopped from raising N.M. Stat. Ann. § 37-1-23 as a defense to Trujillo's contract claim, holding that the terms of N.M. Stat. Ann. § 37-1-23, which require a valid written contract with a public entity in order to enforce contractual rights against that public entity, were clear. ***Id.*** ***See also Garcia v. Middle Rio Grande Conservancy District***, 121 N.M. 728,

918 P.2d 7 (1996) (confirming that N.M. Stat. Ann. § 37-1-23 requires a "valid written contract" in governmental employment setting).

Thus, the Tenth Circuit's decision that an at-will employment relationship with a public employer is sufficient to create a contract for purposes of a 42 U.S.C. § 1981 claim is in conflict with the New Mexico Legislature's and the New Mexico Supreme Court's determinations of what constitutes a contract in the unique setting of public employment. This raises a question as to whether the Tenth Circuit's decision effectively preempts the State of New Mexico's sovereign right to determine the scope of contracts with a state governmental entity under state law.

Indeed, Perry would be unable to enforce any "contract" rights in New Mexico state courts against the County of Bernalillo based on her employment. Perry's at-will employment relationship is simply not a valid, written contract as required by N.M. Stat. Ann. § 37-1-23 and the New Mexico Supreme Court. The Tenth Circuit's decision, however, vests Perry with such rights. Indeed, it appears that based on the Tenth Circuit's decision, every employee of a governmental entity in the State of New Mexico, working in an at-will status, without a valid written employment contract, will be able to seek to enforce contract rights in federal court; contract rights that do not otherwise exist under state law. Essentially, a body of federal contract law will be created contrary to the sovereign rights of the State of New Mexico. By granting this Petition, this Court can address whether the Tenth Circuit's creation of federal contract law should be allowed to preempt the contract law enacted by the State of New

Mexico Legislature and interpreted and enforced by the New Mexico Supreme Court.

II. The Circuit Courts of Appeals' Opinions Evidence Recurring Conflict in an Important Question to be Squarely Decided by this Court; Whether the Race or National Origin of an Individual Chosen to Replace a Plaintiff Alleging Race Discrimination in Employment Is a Material Factor in the Fourth Element of a *Prima Facie* Showing of Racial Discrimination under the *McDonnell Douglas* Analysis.

The burden shifting analysis first announced by this Court in ***McDonnell Douglas Corp. v. Green***, 411 U.S. 792 (1973) was designed to prescribe a "sensible, orderly way to evaluate evidence in a Title VII disparate -treatment case." ***St. Mary's Honor Center v. Hicks***, 509 U.S. 502, 525 (1993) (Souter, J. dissenting). The purpose of the ***McDonnell-Douglas*** analysis is "to sharpen the inquiry into the elusive factual question of intentional discrimination." ***Texas Dept. of Community Affairs v. Burdine***, 450 U.S. 248, 255, n.8 (1981). Although Perry's case does not involve race discrimination claims under Title VII, the ***McDonnell Douglas*** analysis has been applied to claims such as Perry's brought under 42 U.S.C. § 1981, (***see Patterson v. McLean Credit Union***, 491 U.S. 164, 186 (1989); ***Thomas v. Denny's Inc.***, 111 F.3d 1506, 1509 (10th Cir.), ***cert. denied***, 522 U.S. 1028 (1997)), and has been equally assumed applicable to claims brought under the Age Discrimination in Employment Act of 1967 (***see O'Conner v. Consolidated Coin Caterers Corp.***, 517

U.S. 308 (1996)), 42 U.S.C. § 1983 (***see St. Mary's Honor Center v. Hicks***, 509 U.S. 502, 506 n.1 (1993)) and the New Mexico Human Rights Act (***see Smith v. FDC Corp.***, 109 N.M. 514, 787 P.2d 43 (1990)). Thus, the ***McDonnell-Douglas*** analysis is applicable to virtually every employment claim brought under federal law and New Mexico state law, and its proper, sensible and stable interpretation and application affects thousands of litigants in federal and state courts.

Despite the critical importance of the interpretation and application of the ***McDonnell Douglas*** analysis, the Circuit Courts of Appeals in virtually every circuit continue to struggle with articulating and applying the fourth element of the ***McDonnell Douglas*** *prima facie* case, leading to confusing and inconsistent results. Moreover, at least one Justice of this Court has stated that this Court has yet to address a significant question concerning the fourth element of the ***McDonnell Douglas*** *prima facie* case.

Specifically, in ***St. Mary's Honor Center v. Hicks***, 509 U.S. 502 (1993) a majority of this Court, following the courts below, noted, without comment or criticism, that it was unchallenged that the respondent Melvin Hicks had satisfied the minimal requirements of a *prima facie* case under Title VII for alleged race discrimination in his employment by proving: (1) that he was black; (2) that he was qualified for the employment position; (3) that he was demoted from that position and ultimately discharged, and; (4) **that the position remained open and was ultimately filled by a white man**. ***Id.*** at 506 (*Emphasis added*). Justice Souter, writing for the dissent in ***St. Mary's*** stated, however, that although this four part standard was

mentioned by the ***St. Mary's*** majority, "this Court has not directly addressed the question of whether the personal characteristics of someone chosen to replace a Title VII plaintiff are material." ***Id.*** at 527 n. 1.

In ***O'Conner v. Consolidated Caterers Corporation***, 517 U.S. 308, 116 S.Ct. 1307 (1996), this Court addressed the question of whether the fact that an Age Discrimination in Employment Act of 1967 (hereafter "ADEA") plaintiff was replaced by someone outside the protected class (i.e., under age 40) was a proper element of the ***McDonnell Douglas*** *prima facie* analysis. In announcing that a comparison of the ages of the terminated and replacement employees was not useful for purposes of analyzing a claim brought under the ADEA, this Court noted that the ADEA prohibits discrimination on the basis of age and not class membership. ***Id.*** at 313. However, this Court offered no opinion on whether its reasoning in ***O'Conner*** applied to discrimination claims based on race, national origin or gender, given that unlike age, which is easily quantified, immutable characteristics such as race, national origin and gender cannot be quantified or compared.[1]

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[1] The Tenth Circuit opinion in this case apparently embraces the reasoning in ***O'Connor*** as applicable in non-age discrimination cases. Specifically, the Tenth Circuit voices its concern that if the personal characteristics of a plaintiff's replacement are considered in the fourth element of the ***McDonnell Douglas*** *prima facie* case, an employer who terminates a "feminist" woman or an African American, could avoid liability by respectively replacing the terminated employee with a "subordinate" woman or an African American who "knows his place." APP. 22. However, Petitioners are not aware of any decisions of this Court that support the notion that one woman can be "more female" than another woman, or that

The Circuit Courts of Appeals that have considered the question of whether the personal characteristics of a replacement employee are relevant to the fourth element of the ***McDonnell Douglas*** *prima facie* case have reached confusing and inconsistent results, both among the circuits and often within the same circuit. For example, in ***Brown v. McLean***, 159 F.3d 898, 905 (4th Cir. 1998), ***cert. denied***, ___ U.S. ___, 119 S.Ct. 1577 (1999), the United States Court of Appeals for the Fourth Circuit affirmed the lower court's dismissal of gender discrimination claims brought by plaintiff Brown based on the fact that Brown, a male, was replaced by a male. Citing to this Court's decision in ***St. Mary's Honor Ctr. v. Hicks***, 509 U.S. 506 (1993), the Fourth Circuit Court of Appeals held that in order to make out a *prima facie* case of discriminatory termination, a plaintiff was ordinarily required to show that the position was ultimately filled by someone outside of the protected class. ***Id.*** The Fourth Circuit Court of Appeals further noted that the exceptions to this rule were limited, citing as an example this Court's decision in ***O'Conner*** while explicitly recognizing this Court's distinction in ***O'Conner*** between arbitrary class membership, over 40, and protected attribute, age. ***Id.***

Likewise, in ***Walker v. Mortham***, 158 F.3d 1177 (11th Cir. 1998), ***cert. denied***, ___ U.S. ___, 120 S.Ct. 39 (1999), the United States Court of Appeals for the Eleventh Circuit confirmed that a *prima facie* case of discrimination in a Title VII case where the plaintiff "lost

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one African American can be "more African American" than another. Such a notion undoubtedly would be insulting to females and racial minorities, and is inconsistent with the fact that one's gender and race or national origin are immutable characteristics.

out" to another job applicant required a showing by the plaintiff that: (1) the plaintiff was a member of a protected group; (2) the plaintiff sought and was qualified for the job; (3) that the employer rejected the plaintiff despite the plaintiff's qualifications; and (4) that after the plaintiff's rejections, **the employer filled the position with a person outside of the plaintiff's protected class**. ***Id.*** at 1186 (***quoting Crawford v. Western Elec. Co.***, 614 F.2d 1300, 1315 (5th Cir. 1980)) (*emphasis added*). The Eleventh Circuit noted that its standard articulated an alternative to the fourth element announced in ***McDonnell Douglas*** based simply on the fact that unlike the case before the Eleventh Circuit, the ***McDonnell Douglas*** case involved no showing that the defendant employer had hired anyone for the plaintiff's position. ***Id.*** Moreover, the Eleventh Circuit went on to state that its standard, which included the above-emphasized fourth element, was well established in the Eleventh Circuit. ***Id.*** (citations omitted).

Similarly, in ***Gonzalez v. Ingersoll Milling Machine Company***, 133 F.3d 1025, 1031-35 (7th Cir. 1998), the United States Court of Appeals for the Seventh Circuit affirmed the dismissal of a plaintiff's Title VII and 42 U.S.C. § 1981 claims due to the plaintiff's failure to prove a *prima facie* case of racial or national origin discrimination. In reaching this result, the Seventh Circuit Court of Appeals held that under the ***McDonnell Douglas*** analysis, a plaintiff must prove that: (1) she was in a protected class; (2) she was performing her job satisfactorily; (3) she was the subject of a materially adverse employment action; and (4) **others outside of the protected class were treated more favorably.** ***Id.*** at 1032 (*emphasis added*). The plaintiff failed to meet this announced fourth element for both her Title VII claim and

her 42 U.S.C. § 1981 claim, requiring their dismissal. ***Id.*** at 1032, 1035.

The articulation of the four elements required for a *prima facie* case of racial discrimination announced by the Seventh Circuit Court of Appeals in ***Gonzalez*** is inconsistent with the Seventh Circuit's discussion in its per curiam opinion in ***Carson v. Bethlehem Steel Corp.,*** 82 F.3d 157 (7th Cir. 1996). In ***Carson***, the Seventh Circuit affirmed a summary judgment in favor of an employer and against a former employee alleging race discrimination. ***Id.*** at 159. Nevertheless, the Seventh Circuit found that the district court erred when it remarked that the fact that the white plaintiff was replaced by another white employee prevented the plaintiff from establishing a *prima facie* case of discrimination. ***Id.*** at 158.

The United States Court of Appeals for the Sixth Circuit has similarly announced inconsistent results. For example, in ***Jackson v. Richards Med. Co.***, 961 F.2d 575, 587 n.12 (6th Cir. 1992), the Sixth Circuit noted that the fact that an employer replaced a Title VII plaintiff with a person from within the same protected class was not, by itself sufficient grounds for dismissal of a Title VII claim. Conversely, in ***Talley v. Bravo Pitino Restaurant, Ltd.***, 61 F.3d 1241, 1247 (6th Cir. 1995), a case decided three years after ***Jackson***, the Sixth Circuit held that the fourth element of the ***McDonnell Douglas*** *prima facie* test could be met by plaintiff's showing either: (1) that the plaintiff was replaced by a person outside of the protected class; or (2) that similarly situated non-protected employees were treated more favorably. In either case, the race or national origin of the replacement or similarly situated employee was determinative in the analysis of the fourth element of

the ***McDonnell-Douglas*** *prima facie* case. (***See also Hopkins v. Electronic Data Systems Corp.***, 196 F.3d 655, 660 (6th Cir. 1999) (announcing a five element test for the determination of whether a plaintiff can prove a *prima facie* case of handicap discrimination, the fifth element being that plaintiff was replaced by a member outside of the protected class or was treated less favorably than similarly-situated non-protected employees)).

The United States Court of Appeals for the First Circuit has expressly held that "in a case where an employee claims to have been discharged in violation of Title VII, she can make out the fourth element of her *prima facie* case without proving that her job was filled by a person not possessing the protected attribute." ***Cumpiano v. Banco Santander P.R.***, 902 F.2d 148, 155 (1st Cir. 1990). The First Circuit did not, however, find the personal characteristics of the successor employee to be completely irrelevant. Instead, it determined that "the attributes of a successor employee may have evidentiary force" which the plaintiff could then explain or counter. ***Id.***

In ***Pivirotto v. Innovative Systems, Inc.***, 191 F.3d 344, 354 (3rd Cir. 1999), the United States Court of Appeals for the Third Circuit agreed with the First Circuit's decision in ***Cumpiano***, in holding that a plaintiff can satisfy the fourth element of a *prima facie* case of discrimination without showing that the position was filled by someone outside of the protected class. The Third Circuit also noted, based on its reading of the decisions of other Circuit Courts of Appeals, that the Second, Fifth, Sixth, Eighth and Eleventh Circuits held it was improper to require a plaintiff in a discrimination case to demonstrate

that the plaintiff was replaced by someone outside of the protected class for purposes of the plaintiff's *prima facie* case. ***Id.*** Interestingly, however, the cases cited by the Third Circuit in support of its understanding as to the law in the Sixth, Seventh and Eleventh Circuits were older cases that are inconsistent in their articulation of the fourth element with later decided cases by these same Circuit Courts of Appeals. ***(See id.*** at 354 n.6, collecting cases. ***But compare Jackson v. Richards Med. Co.***, 961 F.2d 575, 587 n.12 (6th Cir. 1992) (employer's replacement of plaintiff with similarly protected class member is not, by itself sufficient grounds for dismissal of a Title VII claim) ***with Talley v. Bravo Pitino Restaurant, Ltd.***, 61 F.3d 1241, 1247 (6th Cir. 1995)(fourth element of the ***McDonnell Douglas*** *prima facie* test could be met by plaintiff's showing either: (1) that the plaintiff was replaced by a person outside of the protected class; or (2) that similarly situated non-protected employees were treated more favorably). ***Compare also Carson v. Bethlehem Steel Corp.,*** 82 F.3d 157, 158 (7th Cir. 1996) (district court erred when it remarked that the fact that the white plaintiff was replaced by another white employee prevented the plaintiff from establishing a *prima facie* case of discrimination) ***with Gonzalez v. Ingersoll Milling Machine Company***, 133 F.3d 1025, 1032 (7th Cir. 1998) (dismissal of plaintiff's Title VII and 42 U.S.C. § 1981 claims proper due to plaintiff's failure to meet the fourth element of her *prima facie* case of discrimination; i.e., that others outside of the protected class were treated more favorably). ***Compare also Howard v. Roadway Express, Inc.***, 726 F.2d 1529, 1534 (11th Cir. 1984) (district court erred in stating there is no discrimination against a black person not selected for a job when the person selected is black) ***with Walker v. Mortham***, 158 F.3d 1177, 1186 (11th

Cir. 1998), ***cert. denied***, ___ U.S. ___, 120 S.Ct. 39 (1999) (well-established standard for *prima facie* case of discrimination in the Eleventh Circuit includes as the fourth element of the test proof that the employer filled the position with a person outside of the plaintiff's protected class)).

Finally, of course, the United States Court of Appeals for the Tenth Circuit has decided in this matter that the fact that a plaintiff was replaced by a person within the protected class is not fatal to the plaintiff's *prima facie* case. APP. 29 - APP. 30. The Tenth Circuit found the approach taken to this issue by the First and Second Circuits "superior to that followed in the other circuits that have addressed the issue." APP. 26. The fact that Perry's position was filled, by anyone, after Perry's termination was sufficient for a *prima facie* showing of discrimination. APP. 29 - APP. 30.

In announcing this decision, the Tenth Circuit did not overrule any of its prior decisions articulating a *prima facie* test that contained a requirement that a protected class member plaintiff show that his or her replacement, or a fellow promoted employee, be outside of the protected class. Instead, the Tenth Circuit stated that its previous decisions setting forth this test, which included ***Sprague v. Thorn Americas, Inc.***, 129 F.3d 1355, 1362 (10th Cir. 1997); ***Thomas v. Denny's, Inc.***, 111 F.3d 1506, 1509 (10th Cir. 1997), ***cert. denied***, 522 U.S. 1028 (1997); ***Murray v. City of Sapulpa***, 45 F.3d 1417, 1420 (10th Cir. 1995); ***Randle v. City of Aurora***, 69 F.3d 441, 451 n.13 (10th Cir. 1995); and ***Kenworthy v. Conoco, Inc.***, 979 F.2d 1462, 1469 (10th Cir. 1992), merely did so in dicta. APP. 19 - APP. 20. However, as illustrated by the trial court's

decision below, this "dicta" has been relied on by district courts as precedent of the Tenth Circuit, and as a logical, stable and consistent procedure by which trial courts can test the validity of a discrimination plaintiff's *prima facie* case. Arguably, therefore, the Tenth Circuit joins several other Circuit Courts of Appeals in having an intra-circuit conflict in its decisions on this critical question of employment law. This issue is now ripe for determination by this Court.

III. The Conflict Between the Circuits Leads to a Substantial Risk of Inconsistent Results in Employment Cases in Federal and State Courts.

As demonstrated above, the Circuit Courts of Appeals are in conflict both inter-circuit and intra-circuit. The danger of such conflicts, and the inconsistent articulations of the fourth element of the ***McDonnell Douglas*** *prima facie* case are illustrated by, but certainly not limited to, this case. Under the jurisprudence of the Fourth, Sixth, Seventh, and Eleventh Circuits, Perry's claims of race discrimination would be dismissed due to the fact that Perry could not make a *prima facie* case of discrimination. Perry, a Hispanic, was replaced by Irene Serna, a Hispanic. APP. 7. This fact is fatal to Perry's *prima facie* case in the above jurisdictions under their most recent pronouncements of the ***McDonnell Douglas*** test. Conversely, in the First, Second, Third, Fifth, Eighth and Tenth Circuits, Perry's claim survives the *prima facie* case analysis despite the fact that her replacement was from within her protected class. The only difference in these two scenarios is the interpretation and application of the fourth element of the *prima facie* case.

The importance of the fourth element of the ***McDonnell Douglas*** *prima facie* test, the only element in conflict among the Circuits, becomes clear when all of the factors are applied together in a case of alleged discrimination arising out of discharge. Every member of a protected class can establish the first prong of the ***McDonnell Douglas*** test because they belong to a protected class. With respect to the second prong, if the individual has been terminated from a specific position, that individual can establish, for purposes of the *prima facie* case, that they are qualified for the position, otherwise they would not have been hired for the position in the first place. The third requirement of the *prima facie* case is established with the requisite showing of any adverse job action. This element is automatically established when an individual brings a claim for discrimination based on their termination.

Therefore, the fourth element of the ***McDonnell Douglas*** test is the most significant element of the plaintiff's *prima facie* case in a race discrimination claim. The fourth element requires a plaintiff to adduce evidence that the adverse job action was motivated by discrimination. ***O'Conner***, 517 U.S. at 312, 116 S.Ct. at 1310. In the Fourth, Sixth, Seventh and Eleventh Circuits, this showing is made by demonstrating that the terminated employee's position was filled by someone outside the protected class. Yet, in those Circuits that do not require such a showing, a discharged plaintiff could be replaced by their identical twin and despite this replacement, the plaintiff could still establish a *prima facie* case of discrimination.

Moreover, differing articulations and applications of the elements of a *prima facie* case of discrimination under the ***McDonnell Douglas*** analysis impact not only federal employment actions, but state employment claims, as well. This is best exemplified by the fact that in this case, the Tenth Circuit reversed not only the summary judgment in favor of Petitioners on Perry's Section 1981 claim, it also reversed the summary judgment in favor of Petitioners on Perry's claims under the New Mexico Human Rights Act. APP. 32 - APP. 34. The Tenth Circuit noted that New Mexico state courts have indicated a willingness to embrace the ***McDonnell Douglas*** test and have repeatedly applied this test in termination cases. APP. 33. However, based on its holding that replacement of a terminated employee by someone within the same protected class was not fatal to the terminated employee's *prima facie* case, the Tenth Circuit reversed the district court's dismissal of Perry's claim under the New Mexico Human Rights Act. APP. 33 - APP. 34.

The Tenth Circuit reached this result despite the fact that it noted in its opinion that under New Mexico Supreme Court precedent, the fourth element of a plaintiff's *prima facie* case had been articulated as a showing by the plaintiff of replacement by someone outside of the protected class, or favorable disciplinary treatment of one outside of the protected class. APP. 33. Based on the Tenth Circuit's holding, which is inconsistent with New Mexico Supreme Court precedent, it is now possible for a plaintiff replaced by another employee in the same protected class to survive a motion for summary judgment in federal court on a state employment discrimination claim, while the same plaintiff would face dismissal in New Mexico state courts on the identical

claim. Similar inconsistent results are likely in other states whose highest courts have announced or embraced the ***McDonnell Douglas*** test in a manner that does not coincide with the United States Circuit Court of Appeals sitting in their jurisdiction. Thus, the impact of the differently articulated fourth element of the ***McDonnell Douglas*** test has widespread impact on employment claims in both federal and state courts.

The need for this Court to address these inconsistencies, and set forth a coherent and consistent standard that all federal courts can apply in the employment discrimination setting cannot be understated. As the Eleventh Circuit has observed, the promulgation of differing standards of proof in employment discrimination claims only promotes confusion and inconsistency, a result undesirable in any context, and one which is exacerbated in employment jurisprudence because of the general instability that pervades this area of the law. ***Walker v. Mortham***, 158 F.3d 1177, 1185 (11th Cir. 1998), ***cert. denied***, ___ U.S. ___, 120 S.Ct. 39 (1999). As the Eleventh Circuit further noted, although it may be necessary to alter the requirements of the *prima facie* case somewhat to respond to unique fact patterns, it is generally unwise to fragment the applicable legal standards in this area. ***Id***. Thus, this Court should grant this Petition for Writ of Certiorari to affirmatively establish a workable, consistent standard for the analysis of a discrimination plaintiff's *prima facie* case.

CONCLUSION

This case involves important considerations of both the sovereign rights of a state to determine on what basis it can and cannot be bound to contracts, and the consistent and coherent articulation and application of the fourth element of the ***McDonnell Douglas*** *prima facie* case of discrimination. For these reasons, as more particularly set forth in the body of this Petition, the Petitioners respectfully request that this Court grant this Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ELIZABETH PERRY, Plaintiff-Appellant and Cross-Appellee, v. JUDY WOODWARD, individually and as the Bernalillo County Clerk and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BERNALILLO, Defendants-Appellees and Cross-Appellants.	Nos. 97-2343 and 98-2003

ORDER
Filed December 20, 1999

Before **EBEL, McWILLIAMS,** and **MURPHY**, Circuit Judges.

These matters are before the court on Appellees' Petition for Rehearing with a Suggestion for Rehearing En Banc. We also have the plaintiff - appellant's response. Upon consideration, the panel grants the Petition for Rehearing, withdraws the prior panel opinion, and issues the attached amended opinion in its place.

The Suggestion for Rehearing En Banc was circulated to all the active judges of the court. No active judge having called for a poll, the Suggestion for Rehearing En Banc is denied.

Entered for the Court,
Patrick Fisher, Clerk of Court

By:
Keith Nelson
Deputy Clerk

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ELIZABETH PERRY, Plaintiff-Appellant and Cross-Appellee, v. JUDY WOODWARD, individually and as the Bernalillo County Clerk and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BERNALILLO, Defendants-Appellees and Cross-Appellants.	Nos. 97-2343 and 98-2003

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV-96-1488-JHG/WWD)

Steven K. Sanders, Albuquerque, New Mexico, for Plaintiff-Appellant/Cross-Appellee.

William D. Slease (Henry F. Narvaez, and Jonlyn M. Martinez, with him on the briefs) of Narvaez, Slease and Schamban, P.A., Albuquerque, New Mexico, for Defendants-Appellees/Cross-Appellants.

Before **EBEL**, **McWILLIAMS**, and **MURPHY**, Circuit Judges.

MURPHY, Circuit Judge.

Plaintiff, Elizabeth Perry ("Perry"), sued her employer, the Board of County Commissioners of the County of Bernalillo, and the County Clerk, Judy Woodward ("Woodward"), individually and as County Clerk (collectively "Defendants"), alleging she was discriminated against on the basis of her race and retaliated against because she opposed employment practices made unlawful by state and federal laws. Perry's complaint alleged that Defendants violated the provisions of both the New Mexico Human Rights Act and 42 U.S.C. § 1981.

Defendants moved for summary judgment.[1] The district court held that Perry had failed to establish a prima facie case of racial discrimination under New Mexico law by either direct or indirect evidence. Additionally, the district court ruled that Perry could not maintain a cause of

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[1]Upon the stipulation of the parties, the motion for summary judgment was heard by a United States Magistrate Judge. *See* 28 U.S.C. § 636(c).

action under 42 U.S.C. § 1981 because she was an at-will employee. The district court also held that Perry was required to present evidence of intentional discrimination to prevail under 42 U.S.C. § 1981 but had failed to do so. The district court, therefore, granted Defendants' motion for summary judgment and dismissed all of Perry's state and federal claims with prejudice. The district court denied Defendants' subsequent motion for attorney's fees. Perry appeals the dismissal of her claims. Defendants appeal the denial of their attorney's fees.

This court exercises jurisdiction over both appeals under 28 U.S.C. § 1291 and 636(c)(3). This court **REVERSES** the summary judgment and **VACATES** as moot the order on attorney's fees.

No. 97-2343

I. FACTUAL BACKGROUND

The evidence is either uncontroverted or treated in a light most favorable to Perry, the non-moving party. On January 1, 1993, Woodward took office as the County Clerk for Bernalillo County, New Mexico. In February 1993, Woodward hired Perry to serve as Deputy County Clerk. Perry began her employment as Deputy County Clerk on March 1, 1993. At the time she accepted the job, Perry understood that the position of Deputy County Clerk was an at-will position.

Woodward began making racist remarks to employees shortly after taking office as County Clerk. During the first staff meeting for employees of the Clerk's

office after her election, and in the course of discussing the educational opportunities available to county employees, Woodward announced that Hispanics needed more education. While speaking with Donna Lopez, an Hispanic employee of the County Clerk's office, Woodward called Lopez a "dirty Mexican." Lopez reported this incident to Viola Cortez, the union steward for the White Collar Union. Cortez was also informed by another employee, Kathy Sandoval, that Woodward had told Sandoval that "Mexicans smell bad." In another incident, Woodward approached Rachel Martinez, the union president, and stated, "You know, there's some Afro-Americans, Rachel, you know that they have bad body odor. There's a lot of Hispanics that have it." After a union meeting attended by county employees, Woodward told Martinez, "There's a lot of old ladies there, and, you know, they're Hispanics, they're set in their own ways. They don't want to learn the new things. . . . I know I can't go in there and start firing everybody, but I can make it so miserable that they will leave, one at a time." In the course of a work-related conversation, Woodward asked Julie Childers, "Do you know why I don't like Hispanics? . . . I don't like Hispanics 'cause they're hot blooded and my ex-husband left me for a hot blooded Mexican."

In December 1993, Perry, who had authority to make hiring decisions, hired an Hispanic woman, Tina Gallegos, to fill a vacant position in the County Clerk's office. Shortly thereafter, in the presence of Jaime Diaz, a supervisor in the Bureau of Elections, Woodward told Perry not to hire any more Hispanic candidates. During a budget meeting held in January 1994, a discussion ensued involving the addition of new positions to the County

Clerk's office. During the course of that discussion, Woodward turned to Perry and said, "And you, I don't want you hiring any more Hispanics." After the meeting, Woodward informed Perry that she intended to be present during all future job interviews conducted by Perry to ensure that Perry "hired some Anglos."[2]

When a clerical position opened up in the County Clerk's office, Woodward sat in while Perry interviewed candidates for the position. In February 1994, Perry hired Arlene Martinez, an Hispanic woman, to fill the clerical position. Approximately one week later, Woodward approached Irene Serna, informed her that she was contemplating firing Perry, and offered Perry's job to Serna. Woodward fired Perry on February 26, 1994. Woodward subsequently hired Serna to replace Perry as Deputy Clerk. Serna is Hispanic.

II. STANDARD OF REVIEW

This court reviews a grant of summary judgment *de novo*, applying the same standard applied by the district court. *See McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1128 (10th Cir. 1998). Under this standard, this court examines the record to determine whether any genuine issue of material fact is in dispute. We construe the factual record and reasonable inferences therefrom in the light most favorable to the nonmoving party. *See*

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[2]Perry testified that after the meeting, Woodward told her "not to even waste my time looking at applications with Hispanic names, not to waste my time interviewing, because she would be present, she wanted to be present in my interviews and make sure that I hired some Anglos."

Curtis v. Oklahoma City Pub. Schs. Bd. of Educ., 147 F.3d 1200, 1214 (10th Cir. 1998). When the nonmovant will bear the burden of proof at trial, she can survive summary judgment only by going beyond the pleadings and presenting evidence sufficient to establish the existence, as a triable issue, of any essential and contested element of her case. *See McKnight*, 149 F.3d at 1128.

If there are no material issues of fact in dispute, this court determines whether the district court correctly applied the substantive law. *See Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996). When this court reviews a grant of summary judgment, it reviews the district court's conclusions of law *de novo*. *See Jones v. Kodak Med. Assistance Plan*, 169 F.3d 1287, 1290-91 (10th Cir. 1999). A district court's determination of New Mexico law is also reviewed *de novo*. *See Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991); *Western Heritage Ins. Co. v. Chava Trucking Inc.*, 991 F.2d 651, 653 (10th Cir. 1993).

III. DISCUSSION

A. Claims Arising Under 42 U.S.C. § 1981

The district court held that Perry's claims arising under 42 U.S.C. § 1981 (hereinafter "section 1981") must be dismissed because Perry was an at-will employee and is, therefore, unable to establish a violation of section 1981. Further, the district court held that Perry must provide proof of intentional discrimination to prevail under section 1981 and failed to do so.

1. At-Will Employment Relationship

The parties agree that Perry had no written employment contract and was an at-will employee under New Mexico law. *See Sanchez v. The New Mexican*, 738 P.2d 1321, 1323 (N.M. 1987) (recounting that, under New Mexico law, unless there is an explicit contract of employment stating otherwise, employment is terminable "at will"). Because no material factual dispute exists with respect to Perry's employment status, this court will reverse the grant of summary judgment only if the district court misapplied substantive law when it concluded that an at-will employee cannot maintain a cause of action under section 1981. *See Kaul,* 83 F.3d at 1212.

Section 1981(a) provides, in part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . ." In 1989, the Supreme Court held that section 1981's prohibition against discriminatory conduct did not extend beyond the formation of a contract to conduct occurring after the establishment of the contractual relationship. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989) (holding that section 1981 "does not apply to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations").

In response to *Patterson* and other cases, Congress enacted the Civil Rights Act of 1991. *See* Pub. L. No. 102-166, 105 Stat. 1071; *see also* H.R. Rep. No. 102-40(II), at 2 (1991) (stating that one of the purposes of the

Civil Rights Act of 1991 was to "respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions"). Pursuant to the Civil Rights Act of 1991, the existing text of section 1981 was redesignated as section 1981(a) and subsections (b) and (c) were added. *See* Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72. Section 1981(b) reads: "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Section 1981 now clearly prohibits discriminatory conduct that occurs both before and after the establishment of the contractual relationship. *See id.*; *see also Hopkins v. Seagate,* 30 F.3d 104, 105 (10th Cir. 1994) (stating that the termination of contracts is included in the protections afforded by section 1981, as amended by the Civil Rights Act of 1991).

Even as amended, section 1981 continues to center on the protection of contractual rights. *See* 42 U.S.C. § 1981(a). Although an employee can now seek redress for discriminatory conduct engaged in by her employer either before or after the formation of the employment relationship, any claim brought pursuant to section 1981 must still be supported by an underlying right of the employee to "make and enforce contracts." *Id.*

Defendants interpret section 1981 to require the existence of a contractual relationship between an employee and her employer and argue that this contractual relationship can only arise if an employee and her

employer have entered into a written employment contract. Defendants argue that the absence of a written employment contract is fatal to an employee's section 1981 claim. Defendants claim Perry cannot maintain a cause of action under section 1981 because she was an at-will employee without a written employment contract.

This court has never directly addressed the question of whether an at-will employee can bring a cause of action under section 1981.[3] For the reasons articulated below, this court declines to adopt the narrow interpretation of section 1981 promoted by Defendants.

Perry's relationship with her employer consisted of Perry's rendition of services in exchange for her employer's payment of wages. Under New Mexico law, this is a contractual relationship. *See Melnick v. State Farm Mut. Auto. Ins. Co.*, 749 P.2d 1105, 1109 (N.M. 1988) ("When an employment contract is not supported by any consideration other than performance of duties and payment of wages, and there is no explicit contract provision stating otherwise, *it is an employment contract for an indefinite period* and terminable-at-will by either party." (emphasis added)). Although Perry was an at-will employee, her relationship with her employer was contractual. *See id.*

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[3]In at least one instance, the United States District Court for the District of New Mexico has held that an at-will employee can maintain a cause of action for retaliation under section 1981. *See O'Neal v. Ferguson Constr. Co.*, 35 F. Supp.2d 832, 837-38 (D.N.M. 1999).

Resolution that a contractual relationship existed only begs the question of whether the contractual relationship between Perry and her employer embodied sufficient contractual rights to support a cause of action for wrongful termination under section 1981. The Seventh Circuit Court of Appeals, for example, has suggested that, because an at-will employment contract does not encompass termination terms, an at-will employee cannot bring an action for wrongful termination against her employer under section 1981. *See, e.g., Gonzalez v. Ingersoll Milling Mach. Co.*, 133 F.3d 1025, 1035 (7th Cir. 1998) (dicta); *see also Gandy v. Gateway Found.*, 1999 WL 102777, *17-*18 (N.D. Ill. Feb. 22, 1999) (magistrate judge's report and recommendation) (discussing *Gonzalez* and implying that an at-will employment relationship would only be sufficient to support a section 1981 claim for demotion or reduction in pay). Those who advance or embrace this argument reason that because an at-will employee may be discharged at any time, the terms of an at-will employment contract extend only to wages, benefits, duties, and working conditions, but do not encompass the time or manner of termination. Consequently, they conclude that because terminations for any reason or no reason are permissible under the terms of an at-will employment contract, employees cannot bring claims under section 1981 alleging wrongful termination.

This position has been explicitly rejected by both the Fourth and Fifth Circuit Courts of Appeal. *See Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1020 (4th Cir. 1999); *Fadeyi v. Planned Parenthood Ass'n*, 160 F.3d 1048, 1052 (5th Cir. 1998). The amendment of section 1981 to include a prohibition against racially

discriminatory conduct in the termination of contracts has effectively altered the at-will employment relationship. Although the general rule that an employer can discharge an at-will employee for any reason or no reason is still valid, an employer can no longer terminate an at-will employment relationship for a racially discriminatory reason. *See* 42 U.S.C. § 1981(b); *see also Hopkins,* 30 F.3d at 105 (stating that the protections of section 1981 now encompass the termination of the employment relationship).

The great weight of well-reasoned authority supports this court's conclusion that the employment-at-will relationship encompasses sufficient contractual rights to support section 1981 claims for wrongful termination. *See, e.g., Spriggs*, 165 F.3d at 1018-20; *Faydei*, 160 F.3d at 1049-52; *LaRocca v. Precision Motorcars, Inc.*, No. 4:98CV3195, 1999 WL 191568, at *11-*13 (D. Neb. Mar. 26, 1999); *O'Neal v. Ferguson Constr. Co.*, 35 F. Supp.2d 832, 837-38 (D.N.M. 1999); *Williams v. United Diary Farmers*, 20 F.Supp.2d 1193, 1201-02 (S.D. Ohio 1998); *Lane v. Ogden Entertainment, Inc.*, 13 F.Supp.2d 1261, 1272 (M.D. Ala. 1998); *Harris v. New York Times*, No. 90 CIV. 5235, 1993 WL 42773, at *3-*4 (S.D.N.Y. Feb. 11, 1993). The district court erred as a matter of law when it dismissed Perry's claims arising under section 1981 because she was an at-will employee.

2. Evidence of Intentional Discrimination

The district court also held that the dismissal of Perry's section 1981 racial discrimination claim was mandated by Perry's failure to produce any evidence of

intentional discrimination. *See Durham v. Xerox Corp.*, 18 F.3d 836, 839 (10th Cir. 1994) ("Only intentional discrimination may violate section 1981."). It is well settled that a plaintiff can show intentional discrimination either by direct evidence of discrimination or by indirect evidence, employing the burden-shifting framework first articulated in the seminal case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).[4] *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Anaeme v. Diagnostek, Inc.*, 164 F.3d 1275, 1278 (10th Cir.), *cert. denied*, 120 S. Ct. 50 (1999).

a. Direct Evidence

Perry argues that evidence of an existing discriminatory employment policy in the County Clerk's office is direct evidence that there was an illegal discriminatory motive underlying her termination. This argument is misplaced in light of the evidence before the district court. In the line of cases referenced by Perry, the adverse employment action suffered by the plaintiff occurred as a direct result of the discriminatory policy. *See, e.g., Trans World Airlines, Inc.*, 469 U.S. at 121. In the instant case, there is no direct evidence Perry was fired

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[4]Perry also argues that a plaintiff who has no direct evidence of racial discrimination and who is not able to establish a prima facie case through a typical *McDonnell Douglas* analysis can nevertheless satisfy her initial burden by introducing indirect evidence whose "cumulative probative force" supports a "reasonable probability of discrimination." Appellant's Brief at 16. We assume Perry is referring to the evidence of Woodward's many, racially-charged statements. We decline to address this argument in light of our holding, *infra*, that Perry has met her prima facie burden.

as a result of the racially discriminatory hiring barriers which Woodward allegedly attempted to impose. Any evidence of Woodward's advocation or implementation of a discriminatory hiring policy does not constitute direct evidence that Perry's termination was motivated by racial discrimination.

Perry also argues that the pervasion of racist statements made by Woodward constitutes direct evidence of racial discrimination. When a plaintiff alleges that discriminatory comments constitute direct evidence of discrimination, this court has held that the plaintiff "must demonstrate a nexus exists between [the] allegedly discriminatory statements and the . . . decision to terminate her." *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir. 1994); *see also Tomsic v. State Farm Mut. Auto. Ins. Co.*, 85 F.3d 1472, 1477-78 (10th Cir. 1996).

The evidence introduced by Perry consists of isolated, disparaging comments made by Woodward to and about Hispanics in general and Hispanic employees of the County Clerk's office in particular. Perry acknowledged during her deposition that none of the derogatory comments made by Woodward were directed toward her. There is no evidence in the record that any of Woodward's comments were intended to directly describe Perry. Further, Perry has failed to demonstrate a causal nexus between Woodward's racist comments and her discharge. Woodward's alleged comments are abhorrent and profoundly unprofessional. They, however, do not represent direct evidence that Perry's termination was the result of Woodward's alleged racism. Accordingly, we agree with the district court's conclusion that Woodward's

comments are nothing more than an expression of her personal opinion and, as such, do not constitute direct evidence of a racially-motivated discharge.

b. Indirect Evidence

A plaintiff who lacks direct evidence of racial discrimination may rely on indirect evidence of discrimination by invoking the analysis first articulated in *McDonnell Douglas*. *See McDonnell Douglas*, 411 U.S. at 802-04. While *McDonnell Douglas* involved a Title VII claim for failure to hire, the analytical framework it pioneered applies equally to claims brought pursuant to section 1981. *See Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1509 (10th Cir. 1997); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1162 (10th Cir. 1991). When the *McDonnell Douglas* analysis is utilized, the burden of production shifts from plaintiff to defendant and back to plaintiff. *See Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 252-53 (1981). The ultimate burden of proving discrimination, however, is borne by the plaintiff. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

A plaintiff relying on *McDonnell Douglas* bears the initial burden of establishing a prima facie case by a preponderance of the evidence. *See Burdine,* 450 U.S. at 252-53. One way a plaintiff may establish a prima facie case of wrongful termination is by showing that: (1) she belongs to a protected class; (2) she was qualified for her job; (3) despite her qualifications, she was discharged; and (4) the job was not eliminated after her discharge. *See Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1174-75 (10th Cir. 1996); *Lujan v. New Mexico Health & Soc.*

Servs. Dep't, 624 F.2d 968, 970 (10th Cir. 1980); *Ray v. Safeway Stores, Inc.*, 614 F.2d 729, 730 (10th Cir. 1980). If the plaintiff establishes her prima facie case, a rebuttable presumption arises that the defendant unlawfully discriminated against her. *See Hicks*, 509 U.S. at 506-07. The defendant must then articulate a legitimate, nondiscriminatory reason for the adverse employment action suffered by the plaintiff. *See McDonnell Douglas*, 411 U.S. at 802. If the defendant is able to articulate a valid reason, the plaintiff can avoid summary judgment only if she is able to show that a genuine dispute of material fact exists as to whether the defendant's articulated reason was pretextual. *See Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995).

Defendants argue that to establish a prima facie case of racial discrimination under section 1981, Perry, who is Hispanic, must show that the individual who was hired to replace her was not Hispanic. Contrary to arguments advanced by Defendants, the Supreme Court has not adopted a test requiring a plaintiff to prove that his replacement does not share his protected attribute. *See Hicks*, 509 U.S. at 506. The language from *Hicks* relied on by Defendants in support of their position could not rationally be construed as the adoption of such a fourth element:

> Petitioners do not challenge the District Court's finding that respondent satisfied the minimal requirements of such a prima facie case (set out in *McDonnell Douglas*, . . .) by proving (1) that he is black, (2) that he was qualified for the position of shift

> commander, (3) that he was demoted from that position and ultimately discharged, and (4) that the position remained open and *was ultimately filled by a white man.*

Id. (emphasis added)

This language represents the Court's restatement of a portion of the district court's ruling and a clarification that the appeal did not involve any claim by the defendants that the plaintiff had not met his prima facie burden. The race of the plaintiff's replacement was never an issue in *Hicks* and the Court did not consider it. Justice Souter, in his dissent, clarifies that the Court has never directly addressed the significance of the physical characteristics of an individual's replacement. *See id.* at 527 n.1 (Souter, J., dissenting) ("The majority . . . mentions that Hicks's position was filled by a white male. This Court has not directly addressed the question whether the personal characteristics of someone chosen to replace a Title VII plaintiff are material, and that issue is not before us today.").

Defendants also argue *O'Connor v. Consolidated Coin Caterers Corp.* supports their position that no inference of discrimination can ever arise unless a plaintiff shows that his replacement does not share his protected attribute. *See* 517 U.S. 308, 311-12 (1996). It is undeniable that the Court in *O'Connor* reiterated that there must be a logical connection between each element of the prima facie case and the inference of discrimination. *See id.* Nevertheless, *O'Connor* provides no support for Defendants' position. In *O'Connor*, an age discrimination

case, the Court found no logical connection between a plaintiff's replacement being outside the protected class and the inference of discrimination. *See id.* at 312. Justice Scalia, writing for a unanimous Court, held that the plaintiff was not required to show he was replaced by someone outside the protected class stating, "The fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age." *Id.*

This court has never *applied* a test containing the inflexible requirement that a plaintiff who is a member of a group that has historically been discriminated against must show that she was replaced by someone outside her protected class to establish a prima facie case of wrongful termination under the *McDonnell Douglas* framework. *But see Reynolds v. School Dist. No. 1*, 69 F.3d 1523, 1534 (10th Cir. 1995) (requiring a *white* plaintiff who alleged she had been denied a promotion because of her race to show that the position she sought was filled by a non-white).[5] While several wrongful-discharge decisions have

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[5]*Reynolds* involved a white, female plaintiff who brought, among other claims, a section 1981 failure-to-promote claim. *See Reynolds v. School Dist. No. 1*, 69 F.3d 1523, 1534 (10th Cir. 1995). The individual who received the promotion sought by Reynolds was also a white female. This court held that Reynolds had failed to meet her prima facie burden because she could not show that the promotion was given to someone of another race. *See id.* The court in *Reynolds* clearly stated that a modification of the traditional *McDonnell Douglas* prima facie elements is necessary in reverse discrimination actions. *See id.* A white plaintiff alleging reverse discrimination "does not necessarily deserve the presumption of discrimination afforded to a member of an ostensibly disfavored minority class." *Id.* Additionally, a failure to promote does not implicate the economic

recited a test containing a requirement that a protected class member show that the position from which he was terminated remained open or was filled by a person not a member of the protected class, none of these decisions have applied the test. *See, e.g., Murray v. City of Sapulpa*, 45 F.3d 1417, 1420 (10th Cir. 1995); *Randle*, 69 F.3d at 451 n.13.[6] Similar tests have been articulated, but never applied, in cases involving failure-to-promote claims. *See, e.g., Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1362 (10th Cir. 1997); *Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1509 (10th Cir. 1997); *Kenworthy v. Conoco, Inc.*, 979 F.2d 1462, 1469 (10th Cir. 1992). The physical characteristics of the individual who replaced the plaintiff or received the position sought by the plaintiff were not dispositive in any of these cases. Thus, a test requiring that the replacement or promoted person be outside the protected class exists only in *dicta*.

It appears the language implicating the physical characteristics of the employee's replacement originated in age discrimination cases in which this court articulated a prima facie case that included a requirement of

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disincentive to terminate a qualified employee, i.e, the individual denied the promotion does not need to be replaced.

[6]Both *Murray* and *Randle* cite *McDonnell Douglas* as the source of the four elements of the prima facie test they recite. The original fourth element set out in *McDonnell Douglas*, however, did not require the plaintiff to show that the position he sought was filled by someone outside the protected class but merely required him to show that, "after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

replacement by someone outside the protected class. *See Schwager v. Sun Oil Co. of Pennsylvania*, 591 F.2d 58, 61 (10th Cir. 1979) (holding that a plaintiff alleging age discrimination must show he was replaced by someone 45 years old or younger); *see also Denison v. Swaco Geolograph Co.*, 941 F.2d 1416, 1420 (10th Cir. 1991); *MacDonald v. Eastern Wyoming Mental Health Center*, 941 F.2d 1115, 1119 (10th Cir. 1991); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988); *Cockrell v. Boise Cascade Corp.*, 781 F.2d 173, 177 (10th Cir. 1986). The first non-ADEA case in which this court suggests a fourth element requiring an individual who suffered an adverse employment action to prove that the new hire or replacement employee did not share the protected attribute is *Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F.2d 793, 799 (10th Cir. 1993), *overruled in part on other grounds*, *Buchanan v. Sherrill*, 51 F.3d 227, 229 (10th Cir. 1995). *Hooks* relied on three of the age discrimination cases cited *supra* for its recitation of that requirement. *See id.* Any discussion of the fourth element in *Hooks* is *dicta*, however, because Hooks was never replaced; his position was eliminated and he was given a choice between early retirement and a demotion.[7] *See id.* at 795. *Hooks* demonstrates that the cases which reference a fourth element implicating the physical characteristics of an employee's replacement evolved from a rule previously

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[7]*Hooks* also involved a failure-to-promote claim. *See Hooks v. Diamond Crystal Specialty Foods, Inc.*, 997 F.2d 793, 795 (10th Cir. 1993), *overruled in part on other grounds*, *Buchanan v. Sherrill*, 51 F.3d 227, 229 (10th Cir. 1995). However, with respect to that claim, the court did not recite a prima facie test that implicated the physical characteristics of the individual who received the promotion. *See id.* at 796.

applicable in age discrimination cases. This rule has since been specifically rejected by the Supreme Court. *See O'Connor*, 517 U.S. at 311-12 (holding that age discrimination plaintiff need not show that his replacement was outside the protected class).

The imposition of the inflexible rule advocated by Defendants is untenable because it could result in the dismissal of meritorious claims. Defendant's rule would preclude suits against employers who replace a terminated employee with an individual who shares her protected attribute only in an attempt to avert a lawsuit. It would preclude suits by employers who hire and fire minority employees in an attempt to prevent them from vesting in employment benefits or developing a track record to qualify for promotion. It would also preclude a suit against an employer who terminates a woman it negatively perceives as a "feminist" and replaces her with a woman who is willing to be subordinate to her male co-workers or replaces an African-American with an African-American who is perceived to "know his place." Although each of these situations involves wrongfully-motived terminations, under the rule advocated by the Defendants, the terminated employee would be unable to meet the prima facie burden. Such a result is unacceptable.

Neither the Supreme Court nor this court has previously applied the rule advocated by Defendants, and this court declines the invitation to adopt it. A non-white employee who claims to have been discharged as a result of racial discrimination can establish the fourth element of her prima facie case without proving that her job was filled

by a person who does not possess her protected attribute.[8] *See, e.g., Brown v. Parker-Hannifin Corp.*, 746 F.2d 1407, 1410 n.3 (10th Cir. 1984) (characterizing as "stricter" the tests adopted by some courts which require a plaintiff to show that her employer either assigned a non-minority person to her job or retained non-minority employees having comparable or lesser qualifications).

This court has stated that a plaintiff may establish a prima facie case of wrongful termination by showing that: (1) she belongs to a protected class; (2) she was qualified for her job; (3) despite her qualifications, she was discharged; and (4) the job was not eliminated after her discharge. *See Lowe*, 87 F.3d at 1174-75; *Lujan*, 624 F.2d at 970; *Ray*, 614 F.2d at 730. This court has also stated that the fourth element of the prima facie test is met if the discharged plaintiff can show that someone was hired to

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[8]If a plaintiff is able to establish a prima facie case under the *McDonnell Douglas* analysis, she has merely created a rebuttable presumption that her employer unlawfully discriminated against her. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981). If the racial characteristics of a plaintiff's replacement were applicable at the prima facie stage, a plaintiff would effectively be required to raise the inference not only that she was discriminated against but that her employer also discriminates against every other employee or potential employee who shares her protected attribute. *Cf. Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group.") The replacement of a terminated plaintiff with an individual who shares the plaintiff's protected attribute does not necessarily negate the inference that the plaintiff was unlawfully discriminated against.

replace her. *See Mohammed v. Callaway*, 698 F.2d 395, 398 (10th Cir. 1983) (holding that the fact the position was filled, instead of remaining open, did not preclude employee from establishing a prima facie case); *Crawford v. Northeastern Okla. State Univ.*, 713 F.2d 586, 588 (10th Cir. 1983) (same).

Notwithstanding the large number of cases which articulate the prima facie test in wrongful-discharge cases, the issue before this panel has never been squarely addressed by this court. Several circuits have addressed the issue and have held that a plaintiff can satisfy the prima facie burden without proving that the position was filled by an individual who does not share the protected attribute. Some circuits have concluded only that a plaintiff is *not precluded* from meeting the prima facie burden by an inability to demonstrate that the replacement employee does not share her protected attribute.[9] *See, e.g., Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 352-54 & n.6 (3rd Cir.1999) (collecting cases); *Nieto v. L&H Packing Co.*, 108 F.3d 621, 624 n.7 (5th Cir. 1997) (distinguishing inconsistent cases in the Fifth Circuit); *Carson v. Bethlehem Steel Corp.*, 82 F.3d 157, 159 (7th Cir. 1996) ("That one's replacement is of another race, sex, or age may help to raise an inference of discrimination, but it is neither a sufficient nor a necessary condition.") (relying on *O'Connor* in a reverse discrimination case); *Williams v. Ford Motor Co.*, 14 F.3d 1305, 1308 (8th Cir. 1994); *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 705 (9th Cir. 1993);

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[9]This position was recognized, but not applied, in *Pitre v. Western Elec. Co., Inc.*, 843 F.2d 1262, 1272 (10th Cir. 1988), a case involving disparate treatment claims by female employees.

Jackson v. Richard's Med. Co., 961 F.2d 575, 587 n.12 (6th Cir. 1992); *Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1534 (11th Cir. 1984).

The First Circuit, however, has held that a plaintiff who claimed she was terminated because of her pregnancy could satisfy the fourth element simply by showing that her position was not eliminated. *See Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 155 (1st Cir. 1990) ("[I]n a case where an employee claims to have been discharged in violation of Title VII, she can make out the fourth element of her prima facie case without proving that her job was filled by a person not possessing the protected attribute. . . . [A] complainant can satisfy the fourth prong of her prima case simply by showing that, as here, the employer had a continued need for someone to perform the same work after [the complainant] left." (citations and quotations omitted)). While *Cumpiano* presents a very narrow fact situation involving a pregnant employee and not a member of a racial minority, the language used by the First Circuit is broad. Additionally, the Second Circuit, in a failure-to-hire case, rejected a test requiring a plaintiff to show that someone outside the protected class was hired instead of plaintiff, and held that a plaintiff could establish the fourth element simply by showing that the employer continued to seek applicants after the plaintiff was rejected. *See Meiri v. Dacon*, 759 F.2d 989, 995-96 (2d Cir.1985) ("Furthermore, although certain courts -- including the district court in this action -- have required an employee, in making out a *prima facie* case, to demonstrate that she was replaced by a person outside the protected class, we believe such a standard is inappropriate and at odds with the policies underlying Title VII." (citations omitted)).

Both of these cases relied on the basic standard originally articulated in *McDonnell Douglas* which only required a plaintiff to show that the employer continued to seek applicants.

The approach taken by the First and Second Circuits is superior to that followed in the other circuits that have addressed the issue. Although the latter circuits do not preclude a plaintiff from meeting the prima facie burden when the replacement or new hire shares the protected attribute, some additional fact from which an inference of discrimination can arise must be shown. None of these courts give any examples of what evidence would be sufficient to give rise to such an inference. This results in too much uncertainty for the district courts and the parties. Additionally, the approach taken by the First and Second Circuits is in concert with Supreme Court precedent.

The Supreme Court has held that when a qualified employee, who is a member of a racial minority group that has traditionally suffered workplace discrimination, is not hired for a job in which a vacancy exists, the failure to hire alone is sufficient to raise the inference of discrimination. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977) (involving Title VII claims for failure to hire and failure to promote). In *Teamsters*, the Court stated,

> The *McDonnell Douglas* case involved an individual complainant seeking to prove one instance of unlawful discrimination. An employer's isolated decision to reject an

> applicant who belongs to a racial minority does not show that the rejection was racially based. Although the *McDonnell Douglas* formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. *Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.*

Id. (emphasis added).

The Court later expounded on the observation made in *Teamsters*: "[W]e are willing to presume [discrimination] largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). Although both *Teamsters* and *Furnco* involved failure-to-hire claims, we see no reason why the Court's reasoning does not apply equally when the plaintiff is alleging wrongful termination. *See Crawford*, 713 F.2d at 588 ("[T]here is no reason to apply a stricter version of the fourth part of the McDonnell Douglas test in a suit alleging a discriminatory discharge rather than a discriminatory failure to hire or promote . . . .").

When viewed against a backdrop of historical workplace discrimination, an employee who belongs to a racial minority and who eliminates the two most common, legitimate reasons for termination, i.e., lack of qualification or the elimination of the job, has at least raised an inference that the termination was based on a consideration of impermissible factors. The firing of a qualified minority employee raises the inference of discrimination because it is facially illogical for an employer to randomly fire an otherwise qualified employee and thereby incur the considerable expense and loss of productivity associated with hiring and training a replacement.

The purpose behind the prima facie requirement established in *McDonnell Douglas* is to obligate a plaintiff to "eliminate[] the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine*, 450 U.S. at 253-54. An inference of discrimination is raised when an employer rejects an otherwise qualified minority employment candidate and thereafter does not eliminate the position for which the candidate was rejected. Evidence of the seeking or hiring of a replacement to fill the position vacated by a discharged plaintiff who is a member of a group which has historically suffered discriminatory treatment is, by itself, sufficient to satisfy the fourth element of the plaintiff's *McDonnell Douglas* prima facie case of racial discrimination.[10]

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[10]The elimination of the position, however, does not necessarily eviscerate a plaintiff's claim that her discharge was racially motivated. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 (1977) (emphasizing that the prima facie case is a flexible standard that may be modified to accommodate

Supreme Court precedent fully supports this court's conclusion that the termination of a qualified minority employee raises the rebuttable inference of discrimination in every case in which the position is not eliminated. The test adopted herein requires a plaintiff to show more than the fact she was terminated to satisfy her prima facie burden; she must also show that she is a member of a protected class that has traditionally suffered workplace discrimination, she was qualified, and the job from which she was terminated was not eliminated. That employee, however, is not therefore entitled to go to trial. The employer has the opportunity to dispel the inference by articulating a legitimate, non-discriminatory reason for terminating the employee. In meritless cases, the plaintiff will be unable to show that the employer's articulated reason is pretextual, and summary judgment will then be entered for the defendant. Thus, the approach taken by this court clarifies the issues for the parties and the lower courts and will not result in meritless claims making it past the summary judgment stage.

Accordingly, we hold that the district court erred as a matter of law when it held that Perry failed to make out her prima facie case of racial discrimination under section 1981 because she was replaced by an Hispanic woman. Defendants do not dispute Perry's assertions that she is Hispanic and a protected person, was qualified to perform her job, and was terminated. Further, it is undisputed that after her termination, a replacement was hired to fill Perry's position. Accordingly, we hold that Perry, a member of a minority group which has historically

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different factual situations).

suffered discriminatory treatment in the workplace, has made out the fourth element of her prima facie case by her introduction of evidence that the position from which she was terminated was filled after her termination. Consequently, the district court erred when it dismissed on this ground Perry's racial discrimination claim arising under section 1981.[11]

3. Section 1981 Retaliation Claim

Perry argues that the district court erred in dismissing her section 1981 retaliation claim because the prima facie case for such a claim differs significantly from the prima facie case for racial discrimination and does not require her to demonstrate that her position was filled by someone who does not possess her protected attribute.[12] Perry argues that she has met her prima facie burden with

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[11]Because the district court ruled that Perry had failed to present a prima facie case of racial discrimination, the court did not proceed to the next level of the *McDonnell Douglas* analysis and address whether Defendants had articulated a legitimate, nondiscriminatory reason for discharging Perry. In light of the lack of a ruling from the district court, we refrain from continuing the *McDonnell Douglas* analysis and leave that and any attendant issues to be addressed by the district court on remand and upon proper motion of the parties.

[12]In retaliation cases, a plaintiff establishes a prima facie case by showing that: (1) she engaged in protected opposition to discrimination; (2) she was subject to adverse employment action; and (3) a causal connection exists between the protected activity and the adverse action. *See Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1103 (10th Cir. 1998).

respect to her retaliation claim and the district court erred when it held otherwise.

Contrary to Perry's understanding of the district court's memorandum order, that order is void of any reference to her section 1981 retaliation claim. Although the district court dismissed all of Perry's state and federal claims with prejudice, the court did not specifically address the merits of any retaliation claim raised by Perry and specifically did not evaluate whether Perry had presented either direct or indirect evidence of retaliation. Therefore, the district court erred in dismissing Perry's section 1981 retaliation claim without analysis or discussion.[13]

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[13]This court can affirm the district court's decision to dismiss Perry's section 1981 retaliation claim for any reason supported by the record. *See* In re *Robinson*, 921 F.2d 252, 253 (10th Cir. 1990) ("An appellee may defend the judgment won below on any ground supported by the record without filing a cross appeal."). This court, however, will not craft a party's arguments for him. In their appellate brief, Defendants do not distinguish the prima facie elements in retaliation cases from those in racial discrimination cases. Because Defendants do not analyze the correct elements, they inevitably fail to advance any relevant argument that Perry has failed to meet her prima facie burden with respect to her retaliation claim. Because Defendants have not adequately developed the argument, we decline to address whether there is an alternative basis to affirm the district court's dismissal of Perry's section 1981 retaliation claim.

B. Claims Arising Under the New Mexico Human Rights Act

1. New Mexico Racial Discrimination Claim

Addressing Perry's claim of racial discrimination brought pursuant to the New Mexico Human Rights Act, the district court held that Perry had failed to introduce either direct or indirect evidence of racial discrimination. The district court, therefore, dismissed Perry's New Mexico racial discrimination claim. In cases brought pursuant to the New Mexico Human Rights Act, a plaintiff must present direct evidence of discrimination or, alternatively, may choose to present indirect evidence by utilizing the *McDonnell Douglas* burden-shifting framework. *See Martinez v. Yellow Freight Sys., Inc.*, 826 P.2d 962, 964-65 (N.M. 1992)

The New Mexico Supreme Court has held that discriminatory statements made directly to an employee by his employer can constitute direct evidence of discrimination. *See Smith v. FDC Corp.*, 787 P.2d 433, 438 (N.M. 1990) (holding the trial court did not err when it found that ageist statements made to discharged employee represented direct evidence of age discrimination). However, as previously discussed, the racist statements made by Woodward were not directed at Perry and did not purport to describe her. Accordingly, under New Mexico law, Woodward's statements do not constitute direct evidence of racial discrimination.

The New Mexico state courts have indicated a willingness to embrace tests developed in light of *McDonnell Douglas* and have repeatedly applied the *McDonnell Douglas* burden-shifting analysis in wrongful termination cases when there is an absence of direct evidence of discrimination. *See Cates v. Regents of the N.M. Inst. of Mining & Tech.*, 954 P.2d 65, 70 (N.M. 1998); *Martinez*, 826 P.2d at 964-65; *Smith*, 787 P.2d at 437. Defendants repeat their argument that Perry must prove her replacement was not Hispanic before she is able to satisfy her prima facie burden under New Mexico law. *See Smith*, 787 P.2d at 437 (stating, in dicta, that a terminated employee can make out his prima facie case by showing that his position was filled by someone who is not a member of his protected class but not thereafter applying this element of the test). In *Smith*, however, the New Mexico Supreme Court clarified that it does not intend to strictly adhere to the prima facie test articulated therein. "A prima facie case may also be made out through other means . . . . For example, a prima facie case can be shown absent a demonstration that the plaintiff was replaced by someone not in the protected class if he can show that he was dismissed purportedly for misconduct nearly identical to that engaged in by one outside of the protected class who was nonetheless retained." *Id.*; *see also Cates*, 954 P.2d at 69-70 (reiterating that the New Mexico courts have characterized the elements of the *McDonnell Douglas* test as "flexible enough to accommodate diverse cases").

There is no real indication that the New Mexico courts would require a plaintiff to satisfy a stricter prima facie burden and prove that she was replaced by an individual who did not possess her protected attribute.

For the same reasons Perry has satisfied her prima facie burden with respect to her section 1981 racial discrimination claim, she has likewise satisfied her prima facie burden with respect to her New Mexico racial discrimination claim. Accordingly, the district court erred when it dismissed that claim.

2. New Mexico Retaliation Claim

In this appeal, both parties raise arguments relating to Perry's retaliation claim arising under the New Mexico Human Rights Act. Defendants' only relevant argument justifying the district court's dismissal of Perry's retaliation claim is that Perry is foreclosed from bringing the claim because she failed to raise it before the New Mexico Department of Labor. This issue was not raised in Defendants' motion for summary judgment and appears to be raised for the first time in Defendants' appellate brief. This court is free to "affirm for reasons other than those relied on by the district court, as long as those reasons find support in the record." *Swoboda v. Dubach*, 992 F.2d 286, 291 (10th Cir. 1993). There is, however, no record support for Defendants' contention that Perry did not include a claim of retaliation in the complaint she filed with the New Mexico Department of Labor.[14] Accordingly, we decline

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[14]After filing a complaint with the New Mexico Department of Labor, Human Rights Division and receiving an adverse determination, Perry filed a complaint in New Mexico state court. Defendants later removed the case to the United States District Court for the District of New Mexico. Defendants claim that Perry attempted to amend her complaint before the New Mexico Human Rights Division to include a claim of retaliation but was not permitted to do so. Defendants, however, have provided no documentation to

to affirm the district court's dismissal of Perry's New Mexico retaliation claim on the grounds advocated by Defendants.

Our discussion of Perry's section 1981 retaliation claim is equally applicable to her New Mexico retaliation claim. Accordingly, the district court erred when it dismissed Perry's New Mexico retaliation claim.

IV. CONCLUSION

In sum, we hold that an at-will employee under New Mexico law can maintain a cause of action for wrongful termination under 42 U.S.C. § 1981 and that, with respect to her racial discrimination claims, Perry has satisfied the fourth element of her *McDonnell Douglas* prima facie case. Accordingly, we **REVERSE** the district court's order granting summary judgment on Perry's section 1981 and New Mexico racial discrimination claims.[15] Additionally, because the district court dismissed Perry's retaliation claims without analysis or discussion, we **REVERSE** the district court's order granting summary judgment on Perry's section 1981 and New Mexico retaliation claims. The case is **REMANDED** for further proceedings consistent with this opinion.

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support this claim.

[15]Perry's motion to certify to the New Mexico Supreme Court the issue of her *prima facie* burden under the New Mexico Human Rights Act is denied.

No. 98-2003

DEFENDANTS' MOTION FOR ATTORNEYS FEES

After the district court granted summary judgment in favor of Defendants in case No. 97-2343, Defendants filed a motion for attorney's fees pursuant to 42 U.S.C. § 1988. The motion was denied by the district court and Defendants appealed. Because we find in favor of Perry in No. 97-2343, Defendants are no longer the prevailing parties, a requirement under the attorney's fees provisions of 42 U.S.C. § 1988. *See Robinson v. City of Edmond*, 160 F.3d 1275, 1280 (10th Cir. 1998). Defendants' cross-appeal, therefore, is moot and the district court's order denying Defendants' their attorney's fees is hereby **VACATED**.

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

ELIZABETH PERRY,

Plaintiff-Appellant
and Cross-Appellee,

v.

JUDY WOODWARD, individually and as the Bernalillo County Clerk and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BERNALILLO,

Defendants-Appellees
and Cross-Appellants.

FILED
United States
Court of Appeals
Tenth Circuit
AUG 27 1999
PATRICK FISHER, Clerk

Nos. 97-2343 and 98-2003

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CIV-96-1488-JHG/WWD)

Steven K. Sanders, Albuquerque, New Mexico, for Plaintiff-Appellant/Cross-Appellee.

William D. Slease (Henry F. Narvaez, and Jonlyn M. Martinez, with him on the briefs) of Narvaez, Slease and Schamban, P.A., Albuquerque, New Mexico, for Defendants-Appellees/Cross-Appellants.

Before **EBEL**, **McWILLIAMS**, and **MURPHY**, Circuit Judges.

MURPHY, Circuit Judge.

Plaintiff, Elizabeth Perry ("Perry"), sued her employer, the Board of County Commissioners of the County of Bernalillo, and the County Clerk, Judy Woodward ("Woodward"), individually and as County Clerk (collectively "Defendants"), alleging she was discriminated against on the basis of her race and retaliated against because she opposed employment practices made unlawful by state and federal laws. Perry's complaint alleged that Defendants violated the provisions of both the New Mexico Human Rights Act and 42 U.S.C. § 1981.

Defendants moved for summary judgment.[1] The district court held that Perry had failed to establish a prima facie case of racial discrimination under New Mexico law by either direct or indirect evidence. Additionally, the district court ruled that Perry could not maintain a cause of action under 42 U.S.C. § 1981 because she was an at-will employee. The district court also held that Perry was required to present evidence of intentional discrimination to prevail under 42 U.S.C. § 1981 but had failed to do so. The district court, therefore, granted Defendants' motion for summary judgment and dismissed all of Perry's state and federal claims with prejudice. The district court denied Defendants' subsequent motion for attorney's fees. Perry appeals the dismissal of her claims. Defendants appeal the denial of their attorney's fees.

This court exercises jurisdiction over both appeals under 28 U.S.C. § 1291 and 636(c)(3). This court **REVERSES** the summary judgment and **VACATES** as moot the order on attorney's fees.

No. 97-2343

I. Factual Background

The evidence is either uncontroverted or treated in a light most favorable to Perry, the non-moving party. On January 1, 1993, Woodward took office as the County Clerk for Bernalillo County, New Mexico. In February

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[1] Upon the stipulation of the parties, the motion for summary judgment was heard by a United States Magistrate Judge. *See* 28 U.S.C. § 636(c).

1993, Woodward hired Perry to serve as Deputy County Clerk. Perry began her employment as Deputy County Clerk on March 1, 1993. At the time she accepted the job, Perry understood that the position of Deputy County Clerk was an at-will position.

Woodward began making racist remarks to employees shortly after taking office as County Clerk. During the first staff meeting for employees of the Clerk's office after her election, and in the course of discussing the educational opportunities available to county employees, Woodward announced that Hispanics needed more education. While speaking with Donna Lopez, an Hispanic employee of the County Clerk's office, Woodward called Lopez a "dirty Mexican." Lopez reported this incident to Viola Cortez, the union steward for the White Collar Union. Cortez was also informed by another employee, Kathy Sandoval, that Woodward had told Sandoval that "Mexicans smell bad." In another incident, Woodward approached Rachel Martinez, the union president, and stated, "You know, there's some Afro-Americans, Rachel, you know that they have bad body odor. There's a lot of Hispanics that have it." After a union meeting attended by county employees, Woodward told Martinez, "There's a lot of old ladies there, and, you know, they're Hispanics, they're set in their own ways. They don't want to learn the new things.... I know I can't go in there and start firing everybody, but I can make it so miserable that they will leave, one at a time." In the course of a work-related conversation, Woodward asked Julie Childers, "Do you know why I don't like Hispanics? ... I don't like Hispanics 'cause they're hot blooded and my ex-husband left me for a hot blooded Mexican."

In December 1993, Perry, who had authority to make hiring decisions, hired an Hispanic woman, Tina Gallegos, to fill a vacant position in the County Clerk's office. Shortly thereafter, in the presence of Jaime Diaz, a supervisor in the Bureau of Elections, Woodward told Perry not to hire any more Hispanic candidates. During a budget meeting held in January 1994, a discussion ensued involving the addition of new positions to the County Clerk's office. During the course of that discussion, Woodward turned to Perry and said, "And you, I don't want you hiring any more Hispanics." After the meeting, Woodward informed Perry that she intended to be present during all future job interviews conducted by Perry to ensure that Perry "hired some Anglos."[2]

When a clerical position opened up in the County Clerk's office, Woodward sat in while Perry interviewed candidates for the position. In February 1994, Perry hired Arlene Martinez, an Hispanic woman, to fill the clerical position. Approximately one week later, Woodward approached Irene Serna, informed her that she was contemplating firing Perry, and offered Perry's job to Serna. Woodward fired Perry on February 26, 1994. Woodward subsequently hired Serna to replace Perry as Deputy Clerk. Serna is Hispanic.

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[2] Perry testified that after the meeting, Woodward told her "not to even waste my time looking at applications with Hispanic names, not to waste my time interviewing, because she would be present, she wanted to be present in my interviews and make sure that I hired some Anglos."

II. Standard of Review

This court reviews a grant of summary judgment de novo, applying the same standard applied by the district court. *See McKnight v. Kimberly Clark Corp.*, 149 F.3d 1125, 1128 (10th Cir.1998). Under this standard, the court examines the record to determine whether any genuine issue of material fact is in dispute. We construe the factual record and reasonable inferences therefrom in the light most favorable to the nonmoving party. *See Curtis v. Oklahoma City Public Schs. Bd. of Educ.*, 147 F.3d 1200, 1214 (10th Cir.1998). When the nonmovant will bear the burden of proof at trial, she can survive summary judgment only by going beyond the pleadings and presenting evidence sufficient to establish the existence, as a triable issue, of any essential and contested element of her case. *See McKnight*, 149 F.3d at 1128.

If there are no material issues of fact in dispute, this court determines whether the district court correctly applied the substantive law. *See Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir.1996). When this court reviews a grant of summary judgment, it reviews the district court's conclusions of law de novo. *See Jones v. Kodak Med. Assistance Plan*, 169 F.3d 1287, 1290-91 (10th Cir.1999). A district court's determination of New Mexico law is also reviewed de novo. *See Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991); *Western Heritage Ins. Co. v. Chava Trucking Inc.*, 991 F.2d 651, 653 (10th Cir.1993).

III. Discussion

A. Claims Arising Under 42 U.S.C. § 1981

The district court held that Perry's claims arising under 42 U.S.C. § 1981 (hereinafter "section 1981") must be dismissed because Perry was an at- will employee and is, therefore, unable to establish a violation of section 1981. Further, the district court held that Perry must provide proof of intentional discrimination to prevail under section 1981 and failed to do so.

1. At-Will Employment Relationship

The parties agree that Perry had no written employment contract and was an at- will employee under New Mexico law. *See Sanchez v. The New Mexican*, 738 P.2d 1321, 1323 (N.M.1987) (recounting that, under New Mexico law, unless there is an explicit contract of employment stating otherwise, employment is terminable "at will"). Because no material factual dispute exists with respect to Perry's employment status, this court will reverse the grant of summary judgment only if the district court misapplied substantive law when it concluded that an at-will employee cannot maintain a cause of action under section 1981. *See Kaul*, 83 F.3d at 1212.

Section 1981(a) provides, in part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts ... as is enjoyed by white citizens ...." In 1989, the Supreme Court held that section 1981's prohibition against discriminatory conduct did not extend beyond the formation of a contract to conduct occurring after the establishment of the contractual relationship. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 171 (1989) (holding that section 1981 "does not apply to

conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations").

In response to *Patterson* and other cases, Congress enacted the Civil Rights Act of 1991. *See* Pub.L. No. 102-166, 105 Stat. 1071; *see also* H.R.Rep. No. 102-40(II), at 2 (1991) (stating that one of the purposes of the Civil Rights Act of 1991 was to "respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions"). Pursuant to the Civil Rights Act of 1991, the existing text of section 1981 was redesignated as section 1981(a) and subsections (b) and (c) were added. See Pub.L. No. 102-166, § 101, 105 Stat. 1071, 1071- 72. Section 1981(b) reads: "For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." 42 U.S.C. § 1981(b). Section 1981 now clearly prohibits discriminatory conduct that occurs both before and after the establishment of the contractual relationship. *See id.*; *see also Hopkins v. Seagate*, 30 F.3d 104, 105 (10th Cir.1994) (stating that the termination of contracts is included in the protections afforded by section 1981, as amended by the Civil Rights Act of 1991).

Even as amended, section 1981 continues to center on the protection of contractual rights. See 42 U.S.C. § 1981(a). Although an employee can now seek redress for discriminatory conduct engaged in by her employer either before or after the formation of the employment

relationship, any claim brought pursuant to section 1981 must still be supported by an underlying right of the employee to "make and enforce contracts." *Id.*

Defendants interpret section 1981 to require the existence of a contractual relationship between an employee and her employer and argue that this contractual relationship can only arise if an employee and her employer have entered into a written employment contract. Defendants argue that the absence of a written employment contract is fatal to an employee's section 1981 claim. Defendants claim Perry cannot maintain a cause of action under section 1981 because she was an at-will employee without a written employment contract.

This court has never directly addressed the question of whether an at-will employee can bring a cause of action under section 1981.[3] For the reasons articulated below, this court declines to adopt the narrow interpretation of section 1981 promoted by Defendants.

Perry's relationship with her employer consisted of Perry's rendition of services in exchange for her employer's payment of wages. Under New Mexico law, this is a contractual relationship. *See Melnick v. State Farm Mut. Auto. Ins. Co.*, 749 P.2d 1105, 1109 (N.M.1988) ("When

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[3] In at least one instance, the United States District Court for the District of New Mexico has held that an at-will employee can maintain a cause of action for retaliation under section 1981. *See O'Neal v. Ferguson Constr. Co.*, 35 F.Supp.2d 832, 837-38 (D.N.M.1999).

an employment contract is not supported by any consideration other than performance of duties and payment of wages, and there is no explicit contract provision stating otherwise, *it is an employment contract for an indefinite period* and terminable-at-will by either party) (emphasis added)." Although Perry was an at-will employee, her relationship with her employer was contractual. *See id.*

Resolution that a contractual relationship existed only begs the question of whether the contractual relationship between Perry and her employer embodied sufficient contractual rights to support a cause of action for wrongful termination under section 1981. The Seventh Circuit Court of Appeals, for example, has suggested that, because an at-will employment contract does not encompass termination terms, an at-will employee cannot bring an action for wrongful termination against her employer under section 1981. *See, e.g., Gonzalez v. Ingersoll Milling Mach. Co.*, 133 F.3d 1025, 1035 (7th Cir.1998) (dicta); *see also Gandy v. Gateway Found.*, 1999 WL 102777, *17-* 18 (N.D.Ill. Feb. 22, 1999) (magistrate judge's report and recommendation) (discussing *Gonzalez* and implying that an at-will employment relationship would only be sufficient to support a section 1981 claim for demotion or reduction in pay). Those who advance or embrace this argument reason that because an at-will employee may be discharged at any time, the terms of an at- will employment contract extend only to wages, benefits, duties, and working conditions, but do not encompass the time or manner of termination. Consequently, they conclude that because terminations for any reason or no reason are permissible

under the terms of an at-will employment contract, employees cannot bring claims under section 1981 alleging wrongful termination.

This position has been explicitly rejected by both the Fourth and Fifth Circuit Courts of Appeal. *See Spriggs v. Diamond Auto Glass*, 165 F.3d 1015, 1020 (4th Cir.1999); *Fadeyi v. Planned Parenthood Ass'n*,160 F.3d 1048, 1052 (5th Cir.1998). The amendment of section 1981 to include a prohibition against racially discriminatory conduct in the termination of contracts has effectively altered the at-will employment relationship. Although the general rule that an employer can discharge an at-will employee for any reason or no reason is still valid, an employer can no longer terminate an at-will employment relationship for a racially discriminatory reason. *See* 42 U.S.C. § 1981(b); *see also Hopkins*, 30 F.3d at 105 (stating that the protections of section 1981 now encompass the termination of the employment relationship).

The great weight of well-reasoned authority supports this court's conclusion that the employment-at-will relationship encompasses sufficient contractual rights to support section 1981 claims for wrongful termination. *See, e.g., Spriggs*, 165 F.3d at 1018-20; *Fadeyi*, 160 F.3d at 1049-52; *LaRocca v. Precision Motorcars, Inc.*, 45 F.Supp.2d 762, 774-75 (D.Neb.1999); *O'Neal v. Ferguson Constr. Co.*, 35 F.Supp.2d 832, 837-38 (D.N.M.1999); *Williams v. United Dairy Farmers*, 20 F.Supp.2d 1193, 1201-02 (S.D.Ohio 1998); *Lane v. Ogden Entertainment, Inc.*, 13 F.Supp.2d 1261, 1272 (M.D.Ala.1998); *Harris v. New York Times*,

No. 90 CIV. 5235, 1993 WL 42773, at *3-*4 (S.D.N.Y. Feb.11, 1993). The district court erred as a matter of law when it dismissed Perry's claims arising under section 1981 because she was an at-will employee.

2. Section 1981 Racial Discrimination Claim

The district court also held that the dismissal of Perry's section 1981 racial discrimination claim was mandated by Perry's failure to produce any evidence of intentional discrimination. *See Durham v. Xerox Corp.*, 18 F.3d 836, 839 (10th Cir.1994) ("Only intentional discrimination may violate section 1981."). It is well settled that a plaintiff can show intentional discrimination either by direct evidence of discrimination or by indirect evidence, employing the burden-shifting framework first articulated in the seminal case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973).[4] *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Anaeme v. Diagnostek, Inc.*, 164 F.3d 1275, 1278 (10th Cir.), *cert. denied*, 120 S.Ct. 50 (1999).

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[4] Perry also argues that a plaintiff who has no direct evidence of racial discrimination and who is not able to establish a prima facie case through a typical *McDonnell Douglas* analysis can nevertheless satisfy her initial burden by introducing indirect evidence whose "cumulative probative force" supports a "reasonable probability of discrimination." Appellant's Brief at 16. We assume Perry is referring to the evidence of Woodward's many, racially-charged statements. We decline to address this argument in light of our holding, infra, that Perry has met her prima facie burden.

Perry argues that evidence of an existing discriminatory employment policy in the County Clerk's office is direct evidence that there was an illegal discriminatory motive underlying her termination. This argument is misplaced in light of the evidence before this court. In the line of cases referenced by Perry, the adverse employment action suffered by the plaintiff occurred as a direct result of the discriminatory policy. *See, e.g., Trans World Airlines, Inc.*, 469 U.S. at 121. In the instant case, there is no direct evidence Perry was fired as a result of the racially discriminatory hiring barriers which Woodward allegedly attempted to impose. Any evidence of Woodward's advocation or implementation of a discriminatory hiring policy does not constitute direct evidence that Perry's termination was motivated by racial discrimination.

Perry also argues that the pervasion of racist statements made by Woodward constitutes direct evidence of racial discrimination. When a plaintiff alleges that discriminatory comments constitute direct evidence of discrimination, this court has held that the plaintiff "must demonstrate a nexus exists between [the] allegedly discriminatory statements and the ... decision to terminate her." *Cone v. Longmont United Hosp. Ass'n*, 14 F.3d 526, 531 (10th Cir.1994); *see also Tomsic v. State Farm Mut. Auto. Ins. Co.*, 85 F.3d 1472, 1477 (10th Cir.1996).

The evidence introduced by Perry consists of isolated, disparaging comments made by Woodward to and about Hispanics in general and Hispanic employees of the County Clerk's office in particular. Perry acknowledged during her deposition that none of the derogatory

comments made by Woodward were directed toward her. There is no evidence in the record that any of Woodward's comments were intended to directly describe Perry. Further, Perry has failed to demonstrate a causal nexus between Woodward's racist comments and her discharge. Woodward's comments, although abhorrent and profoundly unprofessional, if made, do not represent direct evidence that Perry's termination was the result of Woodward's racism. Accordingly, we agree with the district court's conclusion that Woodward's comments are nothing more than an expression of her personal opinion and, as such, do not constitute direct evidence of a racially motivated discharge.

A plaintiff who lacks direct evidence of racial discrimination may rely on indirect evidence of discrimination by invoking the analysis first articulated in *McDonnell Douglas*. *See McDonnell Douglas*, 411 U.S. at 802-04. *McDonnell Douglas* involved a Title VII claim for failure to hire. However, the analytical framework it pioneered applies to claims brought pursuant to section 1981. *See Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1509 (10th Cir.1997); *Drake v. City of Fort Collins*, 927 F.2d 1156, 1162 (10th Cir.1991). When the *McDonnell Douglas* analysis is utilized, the burden of production shifts from plaintiff to defendant and back to plaintiff. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). The ultimate burden of proving discrimination, however, is borne by the plaintiff. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993).

A plaintiff relying on *McDonnell Douglas* bears the initial burden of establishing a prima facie case by a

preponderance of the evidence. *See Burdine*, 450 U.S. at 252-53. If the plaintiff establishes her prima facie case, a rebuttable presumption that the defendant unlawfully discriminated against her arises. *See Hicks*, 509 U.S. at 506- 07. The defendant must then articulate a legitimate, nondiscriminatory reason for the adverse employment action suffered by the plaintiff. *See McDonnell Douglas*, 411 U.S. at 802. If the defendant is able to articulate a valid reason, the plaintiff can avoid summary judgment only if she is able to show that a genuine dispute of material fact exists as to whether the defendant's articulated reason was pretextual. *See Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir.1995).

Defendants argue that to establish a prima facie case of racial discrimination under section 1981, Perry, who is Hispanic, must show that the individual who was hired to replace her was not Hispanic. This court has repeatedly held that a plaintiff may establish a prima facie case of wrongful termination by showing that: (1) she belongs to a protected class; (2) she was qualified for her job; (3) that, despite her qualifications, she was discharged; and (4) that after her discharge the job remained available. *See Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1174-75 (10th Cir.1996); *Lujan v. New Mexico Health & Soc. Servs. Dep't*, 624 F.2d 968, 970 (10th Cir.1980); *Ray v. Safeway Stores, Inc.*, 614 F.2d 729, 730 (10th Cir.1980). This court has also stated that the fourth element of the prima facie test is met if the discharged plaintiff can show that someone was hired to replace her. *See Mohammed v. Callaway*, 698 F.2d 395, 398 (10th Cir.1983) (holding that the fact the position was filled, instead of remaining open, did not preclude

employee from establishing a prima facie case); *Crawford v. Northeastern Okla. State Univ.*, 713 F.2d 586, 588 (10th Cir.1983) (same).

This court has never applied a test containing the inflexible requirement that a plaintiff who is a member of a group that has historically been discriminated against must show that she was replaced by someone outside her protected class in order to establish a prima facie case of wrongful termination under the *McDonnell Douglas* framework. But *see Murray v. City of Sapulpa*, 45 F.3d 1417, 1420 (10th Cir.1995) (articulating a test containing a requirement that a protected class member show that the position from which he was terminated remained open or was filled by a person not of the protected class but not thereafter applying the test); *Randle*, 69 F.3d at 451 n. 13 (same); cf. *Reynolds v. School District No. 1, Denver, Colorado*, 69 F.3d 1523, 1534 (10th Cir.1995) (requiring a *white* plaintiff who alleged she had been denied a promotion because of her race to show that the position she sought was filled by a non-white).[5] The original *McDonnell Douglas* test itself did not require the plaintiff to show that the position he sought was ultimately filled by someone outside his protected class. *See McDonnell Douglas*, 411 U.S. at 802. (stating the fourth element in a failure to hire case is satisfied if the plaintiff is able to

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[5] The court in *Reynolds* clearly stated that a modification of the traditional *McDonnell Douglas* prima facie elements is necessary in reverse discrimination actions. *See Reynolds v. School District No. 1, Denver, Colorado*, 69 F.3d 1523, 1534 (10th Cir.1995). A white plaintiff alleging reverse discrimination "does not necessarily deserve the presumption of discrimination afforded to a member of an ostensibly disfavored minority class." *Id.*

show that "after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications").

The purpose behind the prima facie requirement established in *McDonnell Douglas* is to obligate a plaintiff to create a presumption of unlawful discrimination by "eliminat[ing] the most common nondiscriminatory reasons for the plaintiff's rejection." *Burdine*, 450 U.S. at 253-54. An inference of discrimination is raised when an employer rejects an otherwise qualified minority employment candidate and thereafter does not eliminate the position from which the candidate was rejected.

> Although the McDonnell Douglas formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought. Elimination of these reasons for the refusal to hire is sufficient, absent other explanation, to create an inference that the decision was a discriminatory one.

International Bhd. of Teamsters v. United States, 431 U.S. 324, 358 n. 44 (1977) (involving Title VII claims for failure to hire and failure to promote). The Court later expounded on this observation. "We are willing to

presume [discrimination] largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). We see no reason why the Court's reasoning does not apply equally when the plaintiff is alleging wrongful termination. *See Crawford*, 713 F.2d at 588 ("[T]here is no reason to apply a stricter version of the fourth part of the McDonnell Douglas test in a suit alleging a discriminatory discharge rather than a discriminatory failure to hire or promote."). Evidence of the seeking or hiring of a replacement to fill the position vacated by a discharged plaintiff who is a member of a group which has historically suffered discriminatory treatment is, by itself, sufficient to satisfy the fourth element of the plaintiff's *McDonnell Douglas* prima facie case of racial discrimination.[6]

The multiformity of courts' articulations of the fourth element of a plaintiff's prima facie case in wrongful termination lawsuits illustrates that courts allow a plaintiff flexibility in introducing the evidence necessary to formulate a prima facie case. *See Burdine*, 450 U.S. at 253 ("The burden of establishing a prima facie case of disparate treatment is not onerous."); *McDonnell Douglas*, 411 U.S. at 802 n. 13 ("The facts necessarily will vary ... and the specification ... of the prima facie proof required

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[6] The elimination of the position, however, does not necessarily eviscerate a plaintiff's claim that her discharge was racially motivated. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 (1977) (emphasizing that the prima facie case is a flexible standard that may be modified to accommodate different factual situations).

from [plaintiff] is not necessarily applicable in every respect to differing factual situations."). While the fourth element of a plaintiff's prima facie case may be amorphous, a non-white employee who claims to have been discharged as a result of racial discrimination can make out the fourth element of her prima facie case without proving that her job was filled by a person who does not possess her protected attribute.[7] *See, e.g., Brown v. Parker-Hannifin Corp.*, 746 F.2d 1407, 1410 n.3 (10th Cir.1984) (characterizing as "stricter" the tests adopted by some courts which require a plaintiff to show that her employer either assigned a non-minority person to her job or retained non-minority employees having comparable or lesser qualifications); *see also Hicks*, 509 U.S. at 528 n. 1, 113 S.Ct. 2742 (Souter, J., dissenting) (noting that the Supreme Court has not addressed the issue of whether the

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[7] If a plaintiff is able to establish a prima facie case under the *McDonnell Douglas* analysis she has merely created a presumption that her employer unlawfully discriminated against her. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-255 (1981). If the racial characteristics of a plaintiff's replacement were applicable at the prima facie stage, a plaintiff would effectively be required to raise the inference not only that she was discriminated against but that her employer also discriminates against every other employee or potential employee who shares her protected attribute. *Cf. Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group.") The replacement of a terminated plaintiff with an individual who shares the plaintiff's protected attribute does not necessarily negate the inference that the plaintiff was unlawfully discriminated against. By way of example, it is plausible that an employer may hire a replacement who shares the plaintiff's protected attribute in an effort to ward off a lawsuit.

personal characteristics of an employee's replacement are material to the employee's prima facie case). Accordingly, we hold that the district court erred as a matter of law when it held that Perry failed to make out her prima facie case of racial discrimination under section 1981 because she was replaced by an Hispanic woman.

Defendants do not dispute Perry's assertions that she is a protected person, was qualified to perform her job, and was terminated. Further, it is undisputed that after her termination, a replacement was hired to fill Perry's position. Accordingly, we hold that Perry, a member of a minority group which has historically suffered discriminatory treatment in the workplace, has made out the fourth element of her prima facie case by her introduction of evidence that the position from which she was terminated was filled after her termination. Consequently, the district court erred when it dismissed on this ground Perry's racial discrimination claim arising under section 1981.[8]

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[8] Because the district court ruled that Perry had failed to present a prima facie case of racial discrimination, the court did not proceed to the next level of the *McDonnell Douglas* analysis and address whether Defendants had articulated a legitimate, nondiscriminatory reason for discharging Perry. In light of the lack of a ruling from the district court, we refrain from continuing the *McDonnell Douglas* analysis and leave that and any attendant issues to be addressed by the district court on remand and upon proper motion of the parties.

2. Section 1981 Retaliation Claim

Perry argues that the district court erred in dismissing her section 1981 retaliation claim because the prima facie case for such a claim differs significantly from the prima facie case for racial discrimination and does not require her to demonstrate that her position was filled by someone who does not possess her protected attribute. [9] Perry argues that she has met her prima facie burden with respect to her retaliation claim and the district court erred when it held otherwise.

Contrary to Perry's understanding of the district court's memorandum order, that order is void of any reference to her section 1981 retaliation claim. Although the district court dismissed all of Perry's state and federal claims with prejudice, the court did not specifically address the merits of any retaliation claim raised by Perry and specifically did not evaluate whether Perry had presented either direct or indirect evidence of retaliation. Therefore, the district court erred in dismissing Perry's section 1981 retaliation claim without analysis or discussion. [10]

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[9] In retaliation cases, a plaintiff establishes a prima facie case by showing that: (1) she engaged in protected opposition to discrimination; (2) she was subject to adverse employment action; and (3) a causal connection exists between the protected activity and the adverse action. *See Roberts v. Roadway Express, Inc.*, 149 F.3d 1098, 1103 (10th Cir.1998).

[10] This court can affirm the district court's decision to dismiss Perry's section 1981 retaliation claim for any reason supported by the record. *See* In re *Robinson*, 921 F.2d 252, 253

B. Claims Arising Under the New Mexico Human Rights Act

1. New Mexico Racial Discrimination Claim

Addressing Perry's claim of racial discrimination brought pursuant to the New Mexico Human Rights Act, the district court held that Perry had failed to introduce either direct or indirect evidence of racial discrimination. The district court, therefore, dismissed Perry's New Mexico racial discrimination claim. In cases brought pursuant to the New Mexico Human Rights Act, a plaintiff must present direct evidence of discrimination or, alternatively, may choose to present indirect evidence by utilizing the *McDonnell Douglas* burden-shifting framework. *See Martinez v. Yellow Freight Sys., Inc.*, 113 N.M. 366, 826 P.2d 962, 964-65 (N.M.1992)

The New Mexico Supreme Court has held that discriminatory statements made directly to an employee by his employer can constitute direct evidence of

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(10th Cir.1990) ("An appellee may defend the judgment won below on any ground supported by the record without filing a cross appeal."). This court, however, will not craft a party's arguments for him. In their appellate brief, Defendants do not distinguish the prima facie elements in retaliation cases from those in racial discrimination cases. Because Defendants do not analyze the correct elements, they inevitably fail to advance any relevant argument that Perry has failed to meet her prima facie burden with respect to her retaliation claim. Because Defendants have not adequately developed the argument, we decline to address whether there is an alternative basis to affirm the district court's dismissal of Perry's section 1981 retaliation claim.

discrimination. *See Smith v. FDC Corp.*, 109 N.M. 514, 787 P.2d 433, 438 (N.M.1990) (holding the trial court did not err when it found that ageist statements made to discharged employee represented direct evidence of age discrimination). However, as previously discussed, the racist statements made by Woodward were not directed at Perry and did not purport to describe her. Accordingly, under New Mexico law, Woodward's statements do not constitute direct evidence of racial discrimination.

The New Mexico state courts have indicated a willingness to embrace tests developed in light of *McDonnell Douglas* and have repeatedly applied the *McDonnell Douglas* burden-shifting analysis in wrongful termination cases when there is an absence of direct evidence of discrimination. *See Cates v. Regents of the N.M. Inst. of Mining & Tech.*, 124 N.M. 633, 954 P.2d 65, 70 (N.M.1998); *Martinez*, 826 P.2d at 964-65; *Smith*, 787 P.2d at 437. Defendants repeat their argument that Perry must prove her replacement was not Hispanic before she is able to satisfy her prima facie burden under New Mexico law. See *Smith*, 787 P.2d at 437 (stating, in dicta, that a terminated employee can make out his prima facie case by showing that his position was filled by someone who is not a member of his protected class but not thereafter applying this element of the test). In *Smith*, however, the New Mexico Supreme Court clarified that it does not intend to strictly adhere to the prima facie test articulated therein. "A prima facie case may also be made out through other means.... For example, a prima facie case can be shown absent a demonstration that the plaintiff was replaced by someone not in the protected class if he can show that he was dismissed purportedly for misconduct nearly identical

to that engaged in by one outside of the protected class who was nonetheless retained." *Id.*; *see also Cates*, 954 P.2d at 69-70 (reiterating that the New Mexico courts have characterized the elements of the *McDonnell Douglas* test as "flexible enough to accommodate diverse cases").

There is no real indication that the New Mexico courts would require a plaintiff to satisfy a stricter prima facie burden and prove that she was replaced by an individual who did not possess her protected attribute. For the same reasons Perry has satisfied her prima facie burden with respect to her section 1981 racial discrimination claim, she has likewise satisfied her prima facie burden with respect to her New Mexico racial discrimination claim. Accordingly, the district court erred when it dismissed that claim.

2. New Mexico Retaliation Claim

In this appeal, both parties raise arguments relating to Perry's retaliation claim arising under the New Mexico Human Rights Act. Defendants' only relevant argument justifying the district court's dismissal of Perry's retaliation claim is that Perry is foreclosed from bringing the claim because she failed to raise it before the New Mexico Department of Labor. This issue was not raised in Defendants' motion for summary judgment and appears to be raised for the first time in Defendants' appellate brief. This court is free to "affirm for reasons other than those relied on by the district court, as long as those reasons find support in the record." *Swoboda v. Dubach*, 992 F.2d 286, 291 (10th Cir.1993). There is, however, no record support for Defendants' contention that Perry did not include a

claim of retaliation in the complaint she filed with the New Mexico Department of Labor.[11] Accordingly, we decline to affirm the district court's dismissal of Perry's New Mexico retaliation claim on the grounds advocated by Defendants.

Our discussion of Perry's section 1981 retaliation claim is equally applicable to her New Mexico retaliation claim. Accordingly, the district court erred when it dismissed Perry's New Mexico retaliation claim.

IV. Conclusion

In sum, we hold that an at-will employee under New Mexico law can maintain a cause of action for wrongful termination under 42 U.S.C. § 1981 and that, with respect to her racial discrimination claims, Perry has satisfied the fourth element of her *McDonnell Douglas* prima facie case. Accordingly, we **REVERSE** the district court's order granting summary judgment on Perry's section 1981 and New Mexico racial discrimination claims.[12] Additionally, because the district court dismissed

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[11] After filing a complaint with the New Mexico Department of Labor, Human Rights Division and receiving an adverse determination, Perry filed a complaint in New Mexico state court. Defendants later removed the case to the United States District Court for the District of New Mexico. Defendants claim that Perry attempted to amend her complaint before the New Mexico Human Rights Division to include a claim of retaliation but was not permitted to do so. Defendants, however, have provided no documentation to support this claim.

[12] Perry's motion to certify to the New Mexico Supreme Court the issue of her *prima facie* burden under the New Mexico

Perry's retaliation claims without analysis or discussion, we **REVERSE** the district court's order granting summary judgment on Perry's section 1981 and New Mexico retaliation claims. The case is **REMANDED** for further proceedings consistent with this opinion.

Human Rights Act is denied.

No. 98-2003

Defendants' Motion for Attorneys Fees

After the district court granted summary judgment in favor of Defendants in case No. 97-2343, Defendants filed a motion for attorney's fees pursuant to 42 U.S.C. § 1988. The motion was denied by the district court and Defendants appealed. Because we find in favor of Perry in No. 97-2343, Defendants are no longer the prevailing parties, a requirement under the attorney's fees provisions of 42 U.S.C. § 1988. *See Robinson v. City of Edmond*, 160 F.3d 1275, 1280 (10th Cir.1998). Defendants' cross-appeal, therefore, is moot and the district court's order denying Defendants' their attorney's fees is hereby **VACATED**.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FILED
United States District Court
Las Cruces, New Mexico
OCT 7 1997
Robert M. March, Clerk

ELIZABETH PERRY,

Plaintiff,

vs.

No. CIV 96-1488
JHG/WWD

JUDY WOODWARD, individually and as the Bernalillo County Clerk and the BOARD OF COUNTY COMMISSIONERS of the County of Bernalillo,

Defendants.

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendants' Motion for Summary Judgment filed August 14, 1997.

The Court has reviewed the submissions of the parties and the relevant law, and, for the reasons set forth below, finds that Defendants' motion should be GRANTED.

In February, 1993, Perry was hired by Woodward to serve as her deputy in the Bernalillo County Clerk's office. On February 26, 1994, Woodward terminated Perry's employment. Perry filed a complaint with the New Mexico Human Rights Commission alleging she was terminated the basis of her race (Hispanic) in violation of the New Mexico Human Rights Act. After the New Mexico Human Rights Commission denied her claim, Perry filed a complaint in the Second Judicial District Court of the State of New Mexico alleging violations of the **New Mexico Human Rights Act** as well as **42 U.S.C. § 1981** and Defendants removed the action to federal court. In their motion for summary judgment, Defendants argue they are entitled to summary judgment because plaintiff is unable to establish a prima facie case of racial discrimination or violation of **42 U.S.C. § 1981**.

I. Standard for Summary Judgment

"Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ***Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 52 F.3d 1522, 1527 (10th Cir. 1995) (quoting Fed. R. Civ. P. 56(c))**. "All facts and reasonable inferences must be construed in the light most favorable to the nonmoving party." ***Id.***

> For issues on which the non-movant will bear the burden of proof at trial, the movant simply may show–point out to the district court–that there is an absence of evidence to support the non-moving party's case. Alternatively, the moving party may support its motion for summary judgment with affirmative evidence demonstrating that the non-moving party will be unable to prove its case at trial.

Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1116 (11th Cir. 1993) (quotation omitted)**. If the movant carries this initial burden, "responsibility then devolves upon the non-movant to show the existence of a genuine issue as to [a] material fact." ***Id. On a motion for summary judgment, the issue is "not whether [the court] thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." ***Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986)**. The Court will consider Defendants' motion for summary judgment in light of these standards.

II. New Mexico Human Rights Act Claim

Defendants contend that the Court should grant Defendants summary judgment on Plaintiff's New Mexico Human Rights Acts claim because Plaintiff has failed to present a prima facie case of race discrimination. In addressing cases of race discrimination under the New Mexico Human Rights Act, the New Mexico courts follow the framework of ***McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973)**. ***Martinez v. Yellow Freight System,***

Inc.*, 113 N.M. 366, 368, 826 P.2d 962, 964 (1992).** Plaintiff bears the initial burden of establishing a prima facie case of discrimination which may be accomplished either by presenting direct proof of a discriminatory motive or indirect proof of a discriminatory motive under the ***McDonnell-Douglas framework. ***Id.***

In this case, Perry presents evidence that Woodward made racist remarks regarding Hispanics. However, Perry has not offered any facts which show a causal nexus between the racist remarks and her termination. Isolated comments, which are not related to the termination are not sufficient to show discriminatory animus. ***Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1457 (10th Cir. 1994)**. Therefore, Perry has failed to present direct proof of a discriminatory motive.

The analysis now turns to whether she presented any indirect proof of a discriminatory motive. Under the ***McDonnell-Douglas*** framework, a plaintiff must show : (1) she belonged to a protected class; (2) she was adversely affected by the decision to terminate her; (3) she was qualified for the position; and (4) she was replaced by someone outside the protected class. ***McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Cole v. Ruidoso Municipal Schools*, 43 F.3d 1373, 1380 (10th Cir. 1994)**. It is undisputed that Perry was replaced by an Hispanic. Therefore, she has failed to establish a prima facie case through indirect proof of discriminatory motive. under ***McDonnell-Douglas***. Therefore, defendants are entitled to summary judgment on Perry's claims of race discrimination under the New Mexico Human Rights Act.

III. 42 U.S.C. § 1981 Claim

Defendants argue they are entitled to summary judgment on Perry's claims under 42 U.S.C. § 1981 because she was as an at-will employee, she did not have a valid employment contract and she has failed to present any proof of intentional discrimination.

Perry admits she was an at-will employee with no formal contract. However, she contends her status was modified by her understanding she would have a job for as long as Woodward remained in office. However, under state law the county was not bound by any such understanding. ***Trujillo v. Gonzales*, 106 N.M. 620, 622, 747 P.2d 915, 917 (1987)**. Without a contract, Perry is unable to establish a violation of **42 U.S.C. § 1981**.

In addition, to prevail under **§ 1981**, a plaintiff must provide proof of intentional discrimination. ***White v. Denny's, Inc.*, 918 F.Supp. 1418, 1424 (D. Colo. 1996)**. Perry has failed to submit any evidence of intentional discrimination. Therefore, defendants are entitled to summary judgment on Perry's claim under **42 U.S.C. § 1981**.

A judgment in accordance with this opinion shall be entered.

\s\

JOE H. GALVAN
UNITED STATES MAGISTRATE JUDGE
SITTING BY CONSENT AND
DESIGNATION

Steven K. Sanders, Esq.
Counsel for Plaintiff

Henry F. Navraez, Esq.
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Counsel for Defendant

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FILED
United States District Court
Las Cruces, New Mexico
OCT 7 1997
Robert M. March, Clerk

ELIZABETH PERRY,

Plaintiff,

vs. **No. CIV 96-1488 JHG/WWD**

JUDY WOODWARD, individually and as the Bernalillo County Clerk and the BOARD OF COUNTY COMMISSIONERS of the County of Bernalillo,

Defendants.

SUMMARY JUDGMENT
AND
ORDER OF DISMISSAL

A Memorandum Opinion was entered on this date.

THEREFORE,

IT IS ORDERED that Defendant's Motion for Summary Judgment filed August 14, 1997 is GRANTED.

IT IS FURTHER ORDERED that this case be, and hereby is DISMISSED with prejudice.

\s\

JOE H. GALVAN
UNITED STATES MAGISTRATE JUDGE
SITTING BY CONSENT AND
DESIGNATION

APPENDIX E

BEFORE THE HUMAN RIGHTS COMMISSION

OF THE STATE OF NEW MEXICO

RECEIVED
Aug 30 1996
HUMAN RIGHTS DIVISION

Elizabeth Perry,

Complainant

v. **HRD #94-06-09-0278**

Bernalillo County Clerk's Office

Respondent

DECISION AND ORDER

On April 8 and 9, 1996, this matter came before the Human Rights Commission. Commissioner Candace Conger was appointed hearing officer. The case was heard at the Department of Labor located at 501 Mountain Road, NE Albuquerque, NM. Both Ms. Perry and the County Clerk's office were represented by counsel. The hearing officer heard testimony and received exhibits from both parties. After fully considering the record established, the Commission issues the following decision and order:

FINDINGS OF FACT

1. Perry is an hispanic woman.

2. The County Clerk's Office at all pertinent times employed more than four employees.

3. In January 1993, Judy Woodward took over the elected position of Bernalillo County Clerk. (Testimony of Woodward)

4. Pursuant to Section II of Bernalillo County Ordinance 91-8 and Section 401 (C) of the Bernalillo County Personnel Rules and Regulations, the County Clerk may select two people to serve as deputy clerks, which positions are at-will. (Exhibits A and B)

5. Judy Woodward recruited Perry to fill one of these positions. (Testimony of Woodward and Perry)

6. Perry began to work for Bernalillo County Clerk's office as Deputy for Bureau of Elections in March 1993. (Testimony of Perry)

7. Perry was terminated by Respondent acting through Judy Woodward on or about February 26, 1994. (Testimony of Perry, Exhibits 3, 4)

8. Complainant was replaced by Irene Serna, an hispanic female. (Testimony of Serna)

9. During a mid year budget meeting in January 1994, Woodward made a comment about a blond anglo worker,

indicating that she "stuck out like a sore thumb". (Testimony of Perry, Diaz & Woodward)

10. At the same meeting, Woodward also made a comment about wanting to diversify the County Clerk's Office. (Testimony of Woodward & Short)

11. Woodward's comments although admittedly insensitive, were meant to express her desire to have the office represent the diversity of Bernalillo county. (Testimony of Woodward)

12. Woodward wished to have all employees avail themselves of further available training. Woodward felt that Perry did not avail herself of available training. (Testimony of Woodward)

13. Woodward did not give Perry a reason for her termination due to the fact that Perry was an at-will employee. (Testimony of Woodward & Perry)

14. Perry was terminated as a result of her failure to follow Woodward's directives regarding inappropriate comments, using the county phone for personal calls, failing to undertake additional training, and performance below the standards held by Woodward. (Testimony of Woodward)

CONCLUSIONS OF LAW

1. The New Mexico Human rights Commission has jurisdiction over the parties and subject matter herein.

2. At the time that the allegations arose, Perry was an employee of the county as defined in NMSA 1978, 28-1-2(e) (Repl. Pamp. 1991)

3. County is an employee as defined in NMSA 1978, 28-1-2(b)

4. Perry's claim is discrimination based on Complainant's national origin (hispanic). Perry has the burden of proving that a) she is a member of a protected class, b) that she was qualified for the position, c) that she was terminated from the position, and d) that she was replaced by someone from outside the class. Smith v. FDC Corp., 109 NM 514, 787 P.2d 43 (1990).

5. Perry failed to make a prima facie showing of the above elements, in that she was replaced by someone from within her protected class, Irene Serna an hispanic female.

6. Complainant did not show any direct evidence of discrimination.

7. Complainant has failed to prove by a preponderance of the evidence, that she was terminated due to her national origin.

8. Respondent demonstrated numerous legitimate business reasons that were unrelated to national origin which would justify termination.

ORDER

1. The aforementioned complaint is dismissed with prejudice.

2. The parties are responsible for their respective attorney's fees and costs.

\s\

Human Rights Commission

Date:

Supreme Court, U.S.
FILED
APR 13 2000
CLERK

(2)

No. 99-1527

IN THE

Supreme Court of the United States

JUDY WOODWARD, individually, and as the Bernalillo County Clerk and the BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BERNALILLO,

Petitioners,

v.

ELIZABETH PERRY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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4PP

Comes now the Respondent, Elizabeth Perry, by and through her attorney, Steven K. Sanders, and in accordance with Rule 15 of the Rules of the Supreme Court of the United States replies to the Petition for Writ of Certiorari as follows:

I. REPLY TO STATEMENT OF CASE.

Petitioners' summary of facts concerning the reasons for Perry's termination (pages 5-6 of Petition) is not part of the record before the District Court nor the Tenth Circuit Court of Appeals. Appendix E (pp. 72-76) was not part of the record and should not be relied upon in making any determination of fact.

Petitioners have, however, failed to set out an important fact presented by Respondent to the District Court and to the Tenth Circuit Court of Appeals as follows:

> When an EEOC claim for race discrimination was made by an African American employee against Woodward, she hired an African American as a receptionist and then bragged, "They can't accuse me of being a racist because I have a Black working for me."

(Aplt. App. p. 034, para. 18).

II. REPLY TO CLAIM THAT EMPLOYMENT "AT-WILL" IS EMPLOYMENT WITHOUT A CONTRACT UNDER NEW MEXICO LAW.

Petitioners' claim that an at-will public employee works without a contract of employment ignores established New Mexico law. An "at-will" public employee does have a contract of employment; however, one term of the contract is that it may be terminated at-will. *See, e.g., Garcia v. Middle Rio Grande Conservancy Dist.*, 918 P.2d 7, 121 N.M. 728, (N.M. 1996):

> Nevertheless, in New Mexico **an employment contract is for an indefinite period and is terminable at the will of either party** unless there is a contract stating otherwise. Hartbarger, 115 N.M. at 668, 857 P.2d at 779.

Excerpt from page 918 P.2d 10.

Petitioners' argument that termination of at-will employment does not violate 42 U.S.C. § 1981(b) ignores its specific language which states, "The term 'make and enforce contracts' includes the making, performance, modification and **termination** of contracts, and the enjoyment of **all** benefits, privileges, and conditions of the contractual relationship." 42 U.S.C. § 1981(b).

Finally, the claim that a body of "federal contract law" will be created by the Tenth Circuit's decision is nonsense. It is not the terms of a contract that are relevant to a Section 1981 claim; what is relevant is whether there is a contract and whether that contract was terminated for discriminatory reasons.

III. REPLY TO CLAIM THAT PERRY CANNOT ESTABLISH A PRIMA FACIE CASE OF DISCRIMINATION BECAUSE A PERSON OF THE SAME PROTECTED STATUS REPLACED PERRY.

A. *McDonnell Douglas* is not an inflexible formula.

The argument that one must be replaced by one outside the protected class was rejected in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996): "**Because it lacks probative value**, the fact that an ADEA plaintiff was replaced by someone outside the protected class is not a proper element of the *McDonnell Douglas* prima facie case." 116 U.S. at 1312.

> In our view, however, the proper solution to the problem lies not in making an utterly irrelevant factor

> an element of the *prima facie* case, but rather in recognizing that the *prima facie case*, requires *"evidence adequate to create an inference than an employment decision was based on a[n] [illegal] discriminatory criterion . . ."*

517 U.S. at 312.

The *O'Connor* decision reaffirms the decision in *Teamsters v. United States*, 431 U.S. 324 (1977). *Teamsters* makes it clear that *McDonnell Douglas* did not create an inflexible approach to making a prima facie case as Petitioners would have this Court declare, but that the facts supporting discrimination need to be examined in each case:

> The company and union seize upon the *McDonnell Douglas* pattern as the only means of establishing a prima facie case of individual discrimination. **Our decision in that case, however, did not purport to create an inflexible formulation. We expressly noted that [t]he facts necessarily will vary in Title VII cases, and the specification . . . of the *prima facie* proof required from [a plaintiff] is not necessarily applicable in every respect to differing factual situations.** Id. at 802 n. 13. **The importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required,** but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.

431 U.S. at 358. (Emphasis added).

In the case at bar, the person hired to replace Perry was already a member of the Clerk's office. Therefore, any inference

that might be made in favor of Petitioners is minimal. Additionally, Woodward previously bragged that she could not be sued for discrimination by an African American employee since she had hired another African American. Thus, Woodward has previously used this excuse to hide her discriminatory actions. According to 3 Matthew Bender, *Employment Discrimination*, § 8.08(2), p. 8-129, "an employer might have replaced the plaintiff with another of the same race or sex as 'damage control' for an existing or threatened lawsuit."

Petitioners' argument makes as much sense as the argument rejected in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998) that an employer will not discriminate against a member of his own race or sex. Petitioners' inflexible approach has not and should not become the law.

B. The New Mexico Supreme Court also recognizes that *McDonnell Douglas* is not intended to be an inflexible formula.

The New Mexico Supreme Court has also rejected a mechanistic approach to the establishment of a prima facie case for a claim under the New Mexico Human Rights Act, 28-1-1 *et seq.*, N.M.S.A. 1978 (1996 Repl.). Thus, in *Smith v. FDC Corp.*, 787 P.2d 433, 109 N.M. 514 (S. Ct. 1990) the Court expressly rejected the idea that a plaintiff must prove replacement by someone outside the protected group:

> A prima facie case of discrimination may be made out by showing that the plaintiff is a member of the protected group, that he was qualified to continue in his position, that his employment was terminated, and that his position was filled by someone not a member of the protected class. *Hawkins v. EEOC Corp.*, 883 F.2d 977, 982 (11th Cir. 1989); *Haskell v. Kaman Corp.*, 743 F.2d 113, 119 n.1 (2d Cir. 1984).3 **A prima facie case may also be made out**

> **through other means; not all factual situations will fit into any one type of analysis, although unlawful discrimination may nevertheless be present. For example, a prima facie case can be shown absent a demonstration that the plaintiff was replaced by someone not in the protected class if he can show that he was** dismissed purportedly for misconduct nearly identical to that engaged **in by one outside of the protected class who was nonetheless retained.** *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282-84, 96 S. Ct. 2574, 2579-81, 49 L. Ed. 2d 493 (1976); *Nix v. WLCY Radio/Rahall Communica*tions, 738 F.2d 1181, 1185-86 (11th Cir. 1984).

Excerpt from 787 P.2d at 437. (Emphasis added).

Hence, both this Court and the Supreme Court of New Mexico have rejected a mechanistic formula to proving discrimination. Petitioners' invitation to the creation of such a formula should be rejected.

IV. CONCLUSION.

Perry prays that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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